Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-5514

AMERICANS UNITED, a Corporation, MISSOURI FRIENDS OF PUBLIC SCHOOLS, a Membership Association, G. HUGH WAMBLE and A. L. PALMER,
Petitioners,

vs.

H. LANG ROGERS, F. WILLIAM McCALPIN, EUGENE STRAUSS, JOE T. BUERKLE, RICHARD BLANCK, VIRGINIA YOUNG, LELA HACKNEY BELL, EARL G. HARRIS and JOHN BIGGS, Constituent Members of the Co-ordinating Board for Higher Education of the State of Missouri,
Respondents,

and

INDEPENDENT COLLEGES & UNIVERSITIES OF MISSOURI, INC.,
Intervenor-Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the Supreme Court of Missouri

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PETITION FOR A WRIT OF CERTIORARI

To the Supreme Court of Missouri

Petitioners, AMERICANS UNITED, *et al.*, respectfully pray that a Writ of Certiorari be issued to review the judgment and opinion of the Supreme Court of Missouri, a true copy of which is reported at 538 S.W.2d 711 (Mo. 1976).

OPINIONS BELOW

The "Judgment and Order" of the Trial Court is not reported and is appended hereto as Appendix A. The decision of the Missouri Supreme Court is reported as *Americans United*, etc., et al. v. *Rogers*, et al., 538 S.W.2d 711 (Mo. 1976).

STATEMENT OF JURISDICTIONAL GROUNDS

The judgment of the Missouri Supreme Court upholding Missouri Revised Statutes, Sections 173.200 to 173.235, as not violative of the First Amendment of the Federal Constitution, was rendered on July 26, 1976 and Petitioners' "Motion for Rehearing" was denied on August 6, 1976. The jurisdiction of this Honorable Court is invoked under 28 United States Code 1257(3), 28 United States Code 2101(c) and under Supreme Court Rule No. 19.

QUESTION PRESENTED FOR REVIEW

Does the Statutory Scheme Contained in Missouri Revised Statutes, Sections 173.200 to 173.235, Providing College Tuition Grants to Students Attending Sectarian Colleges, and Containing No Restrictions on the Sectarian Use of Such Funds by the Sectarian Colleges Attended, Violate the First and Fourteenth Amendments of the United States Constitution?

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, First Amendment

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or

abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

United States Constitution, Fourteenth Amendment, Section 1

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTORY PROVISIONS INVOLVED

Missouri Revised Statutes, Title 11, Chapter 173, Sections 173.200 to 173.235, inclusive

"173.200. Purpose of sections 173.200 to 173.235

The general assembly, giving due consideration to the historical and continuing interest of the people of the state of Missouri in encouraging deserving and qualified youths to realize their aspirations for higher education, finds and declares that higher education for residents of this state who desire such an education and are properly qualified therefor, is important to the welfare and security of this state and the nation, and consequently is an important public purpose. The general assembly finds and declares that the state can achieve its full economic and social potential only if every individual has the opportunity to contribute to the full extent of his capabilities and only when

financial barriers to his economic, social and educational goals are removed. It is therefore, the policy of the general assembly and the purpose of sections 173.200 to 173.235 to establish a financial assistance program to enable qualified full-time students to receive nonreligious educational services in a public or private institution of higher education of their choice."

"173.205. Definitions

As used in sections 173.200 to 173.235, unless the context requires otherwise, the following terms mean:

(1) '*Academic year*', the period from August first of any year through July thirty-first of the following year;

(2) '*Approved private institution*', a nonprofit institution, dedicated to educational purposes, located in Missouri which:

(a) Is operated privately under the control of an independent board and not directly controlled or administered by any public agency or political subdivision;

(b) Provides at least a collegiate level course of instruction for a minimum of two years, leading or directly creditable toward an associate or baccalaureate degree;

(c) Meets the standards for accreditation as determined by the North Central Association of Colleges and Secondary Schools;

(d) Does not discriminate in the hiring of administrators, faculty and staff or in the admission of students on the basis of race, color, religion, sex, or national origin and is in compliance with the Federal Civil Rights Acts of 1964 and 1968 and executive orders issued pursuant thereto;

(e) Permits faculty members to select textbooks without influence or pressure by any source;

(3) '*Approved public institution*', an educational institution located in Missouri which:

(a) Is directly controlled or administered by a public agency or political subdivision;

(b) Receives appropriations directly or indirectly from the general assembly for operating expenses;

(c) Provides a collegiate level course of instruction for a minimum of two years leading to or directly creditable toward an associate or baccalaureate degree;

(d) Meets the standards for accreditation as determined by the North Central Association of Colleges and Secondary Schools; and

(e) Does not discriminate in the hiring of administrators, faculty and staff or in the admission of students on the basis of race, color, religion, sex, or national origin and is otherwise in compliance with the Federal Civil Rights Acts of 1964 and 1968 and executive orders issued pursuant thereto;

(f) Permits faculty members to select textbooks without influence or pressure by any source;

(4) '*Coordinating board*', the coordinating board for higher education;

(5) '*Financial assistance*', an amount of money paid by the State of Missouri to a qualified applicant pursuant to sections 173.200 to 173.235;

(6) '*Financial need*', the difference between the financial resources available to an applicant as determined by the coordinating board, and the applicant's anticipated expenses, including tuition, mandatory fees, and board and room while attending an approved private or public institution of higher education. In determining need the coordinating board shall

employ a formula similar to nationally recognized comprehensive mechanisms for determining need, such as those of the American College Testing Program or the College Scholarship Service;

(7) *'Full-time student'*, an individual who is enrolled in and is carrying sufficient number of credit hours or their equivalent at an approved private or public institution to secure the degree or certificate toward which he is working in no more than the number of semesters or their equivalent normally required by that institution in the program in which the individual is enrolled."

"173.210. Coordinating board to administer

The coordinating board shall be the administrative agency for the implementation of the program established by sections 173.200 to 173.235. The coordinating board shall promulgate reasonable rules and regulations for the exercise of its functions and the effectuation of the purposes of sections 173.200 to 173.235. It shall prescribe the form and the time and method of filing applications and supervise the processing thereof. The coordinating board shall determine the criteria for eligibility of applicants and shall evaluate each applicant's financial need. It shall select qualified recipients to receive financial assistance, make such awards of financial assistance to qualified recipients and determine the manner and method of payment to the recipient. The coordinating board shall determine eligibility for renewed assistance on the basis of annual applications for annual evaluations of financial needs, giving priority to renewal applicants over new applicants in dispensing available funds in a given year. In awarding renewal grants, the coordinating board may increase or decrease the amount of financial assistance to an applicant if such action is warranted by a change in the financial condition of the applicant, his spouse or parents or the availability of funds for that year.

As a condition to consideration for initial or renewed assistance, the coordinating board may require the applicant, his spouse and parents to execute forms of consent authorizing the director of revenue of Missouri to compare financial information submitted by the applicant with the Missouri individual income tax returns of the applicant, his spouse and parents for the taxable year immediately preceding the year for which application is made, and to report any discrepancies to the coordinating board."

"173.215. Qualifications of applicant

1. An applicant shall be eligible for initial or renewed financial assistance only if, at the time of his application and throughout the period during which he is receiving such assistance, he

(1) Is a citizen of the United States;

(2) Is a resident of the state of Missouri, as determined by reference to standards promulgated pursuant to section 173.140;

(3) Is enrolled, or has been accepted for enrollment as a full-time undergraduate student in an approved private or public institution;

(4) Establishes that he has financial need;

(5) Has never been convicted in any court of an offense which involved the use of force, disruption or seizure of property under the control of any institution of higher education to prevent officials or students in such institutions from engaging in their duties or pursuing their studies; and

(6) No award shall be made under sections 173.200 to 173.235 to any applicant who is enrolled, or who intends to use the award to enroll, in a course of study leading to a degree of theology or divinity.

2. Financial assistance shall be allotted for one academic year, but a recipient shall be eligible for renewed assistance until he has obtained a baccalaureate degree, provided such financial assistance shall not exceed a total of ten semesters or fifteen quarters or their equivalent. Standards of eligibility for renewed assistance shall be the same as for an initial award of financial assistance."

"173.220. Amount of assistance, how computed

An applicant who is enrolled or has been accepted for enrollment as a freshman, sophomore, junior or senior at an approved private or public institution after August 13, 1972, and who meets the other eligibility criteria shall be entitled to financial assistance based primarily on his financial need and to the extent of his financial need as determined by the coordinating board, except that the amount of such grant shall not exceed the least of:

(1) The applicant's demonstrated financial need as determined by the coordinating board; or

(2) One-half the fall 1971 tuition and mandatory fee charges at the approved institution the applicant plans to attend; or

(3) Nine hundred dollars."

"173.225. Other financial assistance to be reported to coordinating board

If an applicant is granted financial assistance under any other student aid program, public or private, the full amount of such aid shall be reported to the coordinating board by the institution and the recipient."

"173.230. Transfer of recipient to another school, effect of—withdrawal, effect of

A recipient of financial assistance may transfer from one approved public or private institution to another without losing his eligibility for assistance under sections 173.200 to 173.235, but the coordinating board shall make any necessary adjustments in the amount of his award. If a recipient of financial assistance at any time withdraws from an approved private or public institution so that under the rules and regulations of that institution he is entitled to a refund of any tuition, fees, or other charges, the institution shall pay the refund to which he may be entitled, to the coordinating board to the extent of any amount the coordinating board has paid to the recipient for that academic year."

"173.235. Appropriation, Limit on

The total amount appropriated for the purposes of sections 173.200 to 173.235 shall not exceed three million five hundred thousand dollars for each fiscal year."

STATEMENT OF THE CASE

I. Chronology

This cause was originally filed by petitioners on July 16, 1974 in the St. Louis County Circuit Court, challenging the constitutionality of Missouri Revised Statutes, Sections 173.-200 to 173.235, which provide for the use of public funds as grant awards to students attending approved public and private colleges within the State of Missouri. Following the filing of suit numerous legal pleadings and motions were filed, depositions taken, interrogatories propounded and answered

and a lengthy "Stipulation" (Stip.) of facts prepared and filed on October 24, 1975. Extensive oral argument was heard by the Trial Court on January 22, 1976, following the filing of briefs by all parties, and a decision rendered by the Trial Court on January 26, 1976. The Trial Court's decision, as to injunctive relief only, was amended by the Trial Court on January 30, 1976 and by the Missouri Supreme Court on April 1, 1976. Both respondents and intervenor respondent filed their respective notice of appeal to the Missouri Supreme Court on February 3, 1976. On July 26, 1976, the Missouri Supreme Court in a four to three decision reversed and entered judgment in favor of respondents. Petitioners filed their Motion for Rehearing before the Missouri Supreme Court on July 30, 1976 and the same was overruled on August 6, 1976.

II. **The Challenged Statute**

The challenged statute permits tuition grants to students on the basis of need attending approved institutions. An approved private institution is one that, in part,

> "Does not discriminate in the hiring of administrators, faculty and staff or in the admission of students on the basis of race, color, religion, sex or national origin and is in compliance with the Federal Civil Rights Act of 1964 and 1968 and executive orders issued pursuant thereto." *Mo.Rev.Stat.*, § 173.205(2)(d) and § 173.205 (3)(e).

The funds are paid by "individual check in the amount of the award payable solely to the student." (Stip. ¶9) (R. 111). There is no requirement that the funds be used for educational purposes and the student is free to use the money "as he may see fit." (Stip. ¶9) (R. 112). "The payment of the student's obligations to the institution is a matter to be worked out be-

tween the student and the institution." (Stip. ¶9) (R. 112). The distribution of award moneys is accomplished as follows:

> "Payment of the award is made by individual check in the amount of the award payable solely to the student. The Department sends the checks for all of the students attending each institution to the financial aid officer at the particular institution for distribution to the students, which, generally speaking, occurs as follows:
>
> "Each student is notified that his check is available at the cashier's window, and that he need only report to the cashier's window and present the necessary identification to claim the check. The student is expected by the institution to take care of any and all educational expenses such as tuition, fees, and room and board (where applicable) that might be owed to the institution at the time he received the check. If the amount of the student's indebtedness to the institution equals or exceeds the amount of the check, the student normally endorses the check over to the institution and receives a receipt for having made such payment. If the amount of the check exceeds the student's indebtedness, the student normally endorses the check over to the institution and receives back cash or the institution's check for the difference between his indebtedness and the amount of the check. If all of the charges of the institution for tuition, fees, and room and board (where applicable) have been paid from other sources, the check is turned over to the student to be used by him as he may see fit. The payment of a student's obligations to the institution is a matter to be worked out between the student and the institution." (Stip. ¶9) (R. 111-112).

The sole restriction as to the use of such funds for religious, sectarian and/or denominational institutions or purposes is that,

"No award shall be made under sections 173.200 to 173.235 to any applicant who is enrolled, or who intends to use the award to enroll, in a course of study leading to a degree in theology or divinity." *Mo.Rev.Stat.* §173.-215(1)(6).

Of the 17 colleges whose sectarian characteristics are more fully explored, *infra*, only one, St. Louis University (College of Arts and Sciences), offers a degree in theology or divinity which would cause a degree candidate to be ineligible under the program. (Canonical Degree in Licentiate in Philosophy. See said college's catalog [Cat.] at page 222). The remaining 18 schools offer no such degrees which would disqualify a student for assistance. (Avila Cat. at 23, Central Methodist Cat. at 41, Columbia Cat. at 24, Culver-Stockton Cat. at 48, Evangel Cat. at 28, Fontbonne Cat. at 49, Hannibal-LaGrange Cat. at 44-45, 59, Maryville Cat. at 15, Notre Dame Cat. at 17, Rockhurst Cat. at 41, St. Mary's of OFallon Cat. at 22, St. Paul's Cat. at 17, The School of the Ozarks Cat. at 34, Southwest Baptist Cat. at 39-40, Tarkio Cat. at 7 and William Jewell Cat. at 16.) They do provide, however, denominational influences which operate heavily upon the students. All of the sectarian courses offered by the various colleges may be enrolled in by students attending by virtue of tuitions paid and/or reimbursed under the Missouri tuition grant program and such funds are applicable to such credit hours taken.

III. The Nature of Many Approved Institutions

Petitioners contend that at least 17 colleges which have received the status of approved private institutions by respondents are controlled, operated, administered, directed and/or conducted within a sectarian denomination influence and atmosphere. A brief description of the same, as contained in the "Stipulation" (Stip.), their respective catalogs (Cat.), "Answers

of Intervenor-Defendant to Plaintiffs' Interrogatories" (Ans.) and "Amended and Supplemental Answers of Intervenor-Defendant to Plaintiffs' Interrogatories" (Amend. Ans.), follows:

1. Avila College was founded by the Sisters of St. Joseph of Carondelet. (Ans.) (R. 41). The Board of Trustees consists of 11 members, of which at least one-third must be members of the Catholic religious Order of St. Joseph and one of whom shall be a member of the Board of the St. Louis Province Corporation of the Sisters of St. Joseph of Carondelet. Four of the Board's present members belong to the Order. (Stip ¶ 20) (R. 116).

The "Philosophy" of the college provides that,

"Avila is a Catholic college . . . wherein the quality of Christian hope permeates . . . in which each person may gain insight into . . . his relationship with God." (Cat. at 4-5).

"Campus Ministry" at Avila College is defined as,

"We have two basic goals in Campus Ministry. The first is an attempt to make the Kingdom of God a living reality on the Avila campus. The Kingdom of God being an arena and atmosphere of love and joy, of justice and peace. Our second goal is to give a living witness to the Gospel message of the Lord Jesus Christ.

"Campus Ministry attempts to achieve its goals in the following ways. We promote a Christian community on campus through a variety of worship services: Eucharist, sacramets, prayer services, Bible studies, shared prayer, and social gatherings where faculty, students, staff and administration may share their hopes and faiths. Campus ministry promotes theological study and reflection on man's religious nature through courses in the Religious Studies/Philosophy

Department. We also try to integrate our ministry with the other ministries of the campus, such as the departments, clubs, local diocese and churches by promoting and/or co-sponsoring speakers and activities." (Cat. at 5-6).

Good Friday is a college holiday. (Ans.) (R. 42). The college has received as donated services from faculty members who are members of Catholic, religious Orders and who serve without pay, an annual average amount of $125,039.67 during the academic years of 1972-73, 1973-74, 1974-75. (Ans.) (R.42). (Stip. Ex. 14) (R. 153).

The catalog offers a greater variety and number of courses in the Religious Studies program than is offered in any other field of study, except Business. (Cat. at 30-76). Examples of the religious courses include, "The Four Gospels", "Catechetical Perspectives", "Dynamics of the Christian Message", "Jesus Christ", "Christianity and the Secular City" and "Christian Renewal: A Lenten Experience". A heavy emphasis on and partiality to Catholic and Christianity courses exists.

2. Central Methodist College was founded by the Methodist Episcopal Church (presently the United Methodist Church). The Articles of Incorporation provide that the Board of Curators are appointed by Conferences of the Methodist Church in the State of Missouri and at least two-thirds of such Board must be members in good standing of the Methodist Church. The Methodist Bishop of Missouri is an ex-Officio curator. (Stip. ¶30) (R. 118-119).

The college received operating income from the United Methodist Church during the academic year 1973-74 of $291,747.00. (Ans.) (R. 44).

An "Aim" of the college is,

"To challenge students to grow in the understanding and application of the Christian philosophy by the study of the Bible and Christian literature and by contact with Christian personalities." (Cat. at 5).

There is located on the campus both the Paul H. Linn United Methodist Memorial Church (Cat. at 9) and a small Christian chapel in the sub-basement of the old library. (Ans.) (R. 43). In addition, is The Rice H. Cooper Parish House on campus "dedicated to the church school and social activities of the Church" which "offers unusual opportunity for the development of the religious interests of the College as well as of the Church." (Cat. at 9). Weekly Methodist chapel services are held in the Linn Memorial Church. (Cat. at 13).

Restricted scholarships on the basis of religious preferences are awarded (Cat. at 29-31), specific "Ministerial and Christian Service Scholarships" are awarded (Cat. at 31-33) and discounts are given to children of United Methodist missionaries and ministers. (Cat. at 35).

There is a basic freshman requirement of six semester hours of religion (Cat. at 43) and a "Religion" program for concentration, "particularly useful for persons planning upon entering the Christian ministry, Christian education", etc. exists. (Cat. at 53). The Department of Religion evidences a strong preference for Christianity courses. (Cat. at 123-125).

The Board of Curators is charged with the duty "to exercise wholesome, moral and religious influence upon the student body." (Cat. at 5).

3. Columbia College, during the academic year 1973-74, received $10,755.00 primarily from the Christian Church Finance Council (Ans.) (Tr. 46), having been originally founded by the Christian Church (Disciples of Christ). (Amend.Ans.) (R. 103). A course for credit entitled "The Life and Teachings

of Jesus" is offered. (Ans.) (R. 46). The Missouri State Convention of the Disciples of Christ has authority to refuse confirmation of appointment to the Board of Trustees of the college. (Amend.Ans.) (R. 103).

4. Culver-Stockton College was founded by members of the Christian Church (Disciples of Christ). (Ans.) (R. 52). Every student is required to take Religion 201, " 'Our Christian Heritage', which includes a study of American Church History, including 'The Second Great Awakening' ". (Cat. at 2, 56). This course "is approached through the study of the origin, growth and development of the Church." (Cat. at 105).

Church vocational grants are available to students (Cat. at 34) and discounts are given to children of ministers. (Cat. at 38). Many scholarships are restricted to students who are entering the Christian ministry or who have demonstrated "lay Christian service". (Cat. at 34-38). "Religion Awards" are given to eligible Christian students. (Cat. at 44).

The college has a department of Religion and Philosophy which,

> "(O)ffers courses which are basic in preparation for such church vocations as the work of the ministry, mission field, Christian education, and church music.
>
> A Practical Ministries Program is offered those students who are specifically interested in preparing for the parish ministry." (Cat. at 104).

The Religion courses offered place heavy emphasis upon Christianity and include, "The First Century Church," "The Life and Teachings of Jesus," "The Christian Ministry," "The Disciples of Christ in American Culture," "Christian Heritage," "Preaching", "Church Administration" and "Pastoral Work." (Cat. at 105-106).

During the calendar years 1972, 1973 and 1974, the college received an average annual financial contribution from the Christian Church (Disciples of Christ) in the amount of $60,104.14. (Ans.) (R. 53).

5. Evangel College is owned and operated by the General Council of the Assemblies of God. (Stip. ¶ 28) (R. 118). The catalog speaks of the college's "History" as,

> "From the beginning, emphasis has been placed upon a definite Christian experience of conversion, a personal life of holiness, and enduement of power for service through the infilling of the Holy Spirit, and an intense spirit of evangelism and missions." (Cat. at 8).

The college's "Theme" is, in part,

> "Out of sacred Scripture comes a beautiful phrase, which was incorporated in the Constitution of Evangel College. '. . . that in all things he (Christ) might have the preeminence' (Colossians 1:18). It is this phrase which lays a foundation for the choice of the theme of the College, 'Christ is Lord.'
>
> "Jesus Christ, for the Christian, is the most important fact in history; not only the most important fact in world history, but the most important fact in the personal history of the individual. Christ, then is not merely a reference point in time, but an authority by which believers measure and judge all things. The Christian seeks to be Christ-like in obedience, purpose, and motivation, word, and deed. He cannot serve his own self-interests but rather seeks to do God's will as a willing bondslave. This means that all members of the College community, staff, faculty, and students, will commit themselves to follow a higher law than self-interests, to which the disciples were called. 'If any man will come after Me, let him deny himself and take up his cross daily and follow me.' All Christians, then

are linked by a common purpose and goal; Christians differ concerning means, not ends.

"In order to keep ever before the entire constituency of the College the statement's full contribution to higher education, this common purpose and goal is more significant. Could there be a more worthy phrase than one taken from the Scripture which so fulfills our mission that 'Christ is Lord'.

"Evangel College is dedicated wholly to the unity of Biblical Christianity with all knowledge including the humanities, arts, sciences, and specialized subjects, and to the development of the entire personality, through commitment to Christ and the search for truth." (Cat. at 8-9).

The college's "Objectives" are, in part,

"THE SPIRITUAL OBJECTIVE. Evangel College seeks to assist the student in spiritual development. In concrete terms, the student should acquire an awareness of the relationship of his education to a personal conversion based upon faith in Jesus Christ. The student should recognize and experience the Baptism of the Holy Spirit. He should be encouraged to live a Spirit-filled life, acquire an understanding of the Word of God, church history, and missions. These forces will enable him to take a place of leadership and effective witness in the church, in the home, and abroad.

"THE INTELLECTUAL OBJECTIVE. The theme, 'Christ is Lord' inspires Evangel College to assist the student in his intellectual development; to be involved in a life with a theistic world view, to be intellectually curious; to think creatively; to achieve mastery of essential facts and to use them in reaching logical conclusions, and in making choices that are directed toward God's glory and the consummation of His perfect will. It should prepare him for graduate study and a life in pursuit of truth and new knowledge; to discover his abilities and develop them to the

maximum; to obtain an adequate understanding of basic research; and to be able to communicate orally and in writing.

"THE CULTURAL OBJECTIVE. When Christ is Lord of the student in Evangel College, it will help him in his cultural and social development. It will aid him in responding to aesthetic values as expressed in God's creation and the fine arts; in developing perceptiveness in the dynamics of the cultural components of religion, literature, artistic and scientific history; and in accepting responsibilities of citizenship in today's world and in the light of the claims of Christ. The student's effective participation in the life of the family, the church, the community, the nation, and the world as a mature person committed to Christ will also be enhanced.

. . .

"With 'Christ is Lord' as the philosophical guideline, all college personnel, procedures, and instruments shall function within its framework. This means that officers, staff members, faculty, and students will in their life and service make Christ Lord. Administrative planning and decision making will always honor Christ. Class sessions and curriculum will be taught and integrated around Christ as Lord; chapel will be respected and attended as an integrating force. Students will be admitted, counseled, and expected to live and study by this guideline." (Cat. at 10-11).

Students are forbidden to smoke, to drink alcoholic beverages, to dance and to gamble. (Cat. at 13). They are required to "express a Christian commitment" (Stip. ¶ 47A) (R. 122) and approximately 86% of the students are members of Assemblies of God Churches. (Stip. ¶ 48) (R. 122).

All administrators of the college must be members of churches belonging to the Assemblies of God and there exists a preference

towards hiring other staff personnel who belong to such Churches. (Stip. ¶ 13) (R. 119).

A preference also exists in hiring faculty who are members of an Assemblies of God Church and every faculty member must sign as part of his employment contract a " 'declaration of faith and loyalty' in which a faculty member declares that he is familiar with the statement of fundamental truth of the Assemblies of God and that he is in accord therewith." (Stip. ¶ 41) (R. 120-121). Approximately 87% of the faculty are members of Assemblies of God Churches. (Stip. ¶ 45) (R. 121).

Ministerial and Missionary Grants are available for students and families of persons having connection with the Assemblies of God. (Cat. at 19). Students are required to attend 75% of daily convocation programs, consisting mainly of religious services, and to enroll in 16 credit hours of Biblical Studies (Stip. ¶ 51[c]) (R. 124), which courses place a great emphasis on Christianity. (Cat. at 48-50).

With the exceptions of the departments of Music and Physical Education, a larger variety of courses are offered in the combined fields of Biblical Studies, Theology and Religion than any other department. (Cat. at 34-83). The Biblical Studies, Theology and Religion departments place great emphasis on Christianity and courses include, "Introduction to Christian Doctrine", "History of Christian Thought", "Pentecostal Foundations", "Philosophy of Missions", "Christian Ethics" and "Contemporary Christian Thought". (Cat. at 48-49).

Eight of the 11 members of the Board of Directors hold positions within the Assemblies of God Churches. (Cat. at 85). The college during the calendar year 1974 received $165,-269.99 from the Churches and General Council of the Assemblies of God. (Ans.) (R. 57). A Christian chapel is present on campus and contains a cross and a picture of Jesus. (Ans.) (R. 57).

6. Fontbonne College was originally founded by the Catholic Sisters of St. Joseph of Carondelet. (Stip. ¶ 19, 21) (R. 116). The Articles of Incorporation require at least eight of the 21 members of the Board of Trustees to be members of the Order. (Stip. ¶ 21) (R. 116). Approximately one-half of the entire faculty are members of Catholic religious orders (Cat. at 195-207), over 50% are Catholic (Ans.) (R. 59), and the President of the college is required to be a member of the Order. (Stip. ¶ 35) (R. 120).

Sixty-three percent of the student body is Catholic. (Stip. ¶ 48) (R. 122-123). Some of the classrooms contain crucifixes and there is a Catholic chapel on the campus. (Ans.) (R. 59). St. Joseph's Day is a college holiday. (Cat. at 190).

The Department of Religious and Philosophical Studies courses emphasize the study of Catholicism and Christianity and include offerings such as "Christ and Culture" and "Christ and the Twentieth Century." (Cat. at 171).

Fontbonne received contributed services from faculty members who are also members of Catholic religious orders in the amount of $123,541.00 for the academic year 1974-75. (Stip. Ex. 14) (R. 153).

7. Hannibal-LaGrange College is operated by a 33 member Board of Trustees, all of whom are from Missouri Baptist Churches and all of whom are nominated and elected by the Missouri Baptist Convention. (Cat. at 8) (Stip. ¶ 27) (R. 118). The college is owned and supported by the Missouri Baptist Convention. (Cat. at 4).

It is best described on the title page of its catalog as,

> "Evangelistic-Conservative-Baptist
>
> 'That in all things Christ might have the preeminence.'
> Col. 1:18" (Cat. at 1).

The college "is a distinctive Christian school . . . Baptist both in belief and practice." (Cat. at 4). The college "prefers to hire administrators and staff who have a personal Christian commitment and who are members of a Christian church, preferably an evangelical church." (Stip. ¶ 34) (R. 119-120).

The college offers tuition concessions to Baptist ministerial students and family members of Baptist ministers. (Cat. at 28). Certain awards by the college are restricted to students pursuing the Baptist ministry. (Cat. at 34). Special scholarships are available only to Baptist students (Cat. at 29). Drinking is prohibited of students both on or off campus.

Three semester hours of Bible study are required for graduation. (Cat. at 45) (Stip. ¶ 51[1]) (R. 125). Students are expected to attend the twice-weekly chapel programs, which consist mainly of religious services. (Stip. ¶ 52C) (R. 126) (Cat. at 37).

With the sole exception of courses in Music, a greater variety and number of courses are offered in "Bible" than any other area of study. (Cat. at 62-93). Bible courses place a heavy emphasis upon Christianity and include course offerings such as "Pastoral Practices," "Bible Topics in Christianity," "Church Administration," "Preaching I and II," "The Bible and Christian Life," "Evangelism," "Christian Doctrine I and II" and "Great Sermons" of the early Church fathers. (Cat. at 64-67).

8. Maryville College was founded by members of the Catholic Order of the Religious of the Sacred Heart. (Cat. at 5). It is operated by a Board of Trustees of 26 members, five of whom must be members of the Order. (Stip. ¶ 22) (R. 116). One-third of the Board of Trustees are members of Catholic religious Orders. (Cat. at 83). Fifty to 60% of the faculty are Catholic. (Stip. ¶ 45) (R. 121-122); and 25% are members of Catholic religious Orders. (Cat. at 83-89).

The college requires its students to take six credit hours in religious studies. (Stip. ¶ 51[d]) (R. 124). With the exceptions of the departments of Fine Arts, Education, Management, Music and Philosophy, the Religious Studies program offers a greater variety of courses than any other area of study. (Cat. at 31-81). The Religious Studies courses place a heavy emphasis on Catholicism and Christianity and includes "Jesus Seminar", "Johannine Writings", "The Gospel of Mark", "Christian Anthropology", "How Christian Community Was Born And Is Born", "The Letters of Paul", "Sacramental Theology", "Church—The Continuing Quest" and "Contemporary Catechetics". (Cat. at 77-80).

9. Notre Dame College was founded by the School Sisters of Notre Dame, a Catholic religious Order (Cat. at 6). It is operated by a Board of Trustees, presently of 12 members—more than one-third of whom must be members of the Order and, in fact, one-half are presently members of the Order. (Stip. ¶ 23) (R. 117). The President of the College is required to be a School Sister of Notre Dame. (Stip. ¶ 36) (R. 120). The college buildings are owned, maintained and furnished by the Order for use to the college, rent-free. (Deposition of Sister Carol Ann Collins [Coll.Depo.] at pages 54-55, 67).

The "Philosophy" of the college is stated as,

> "We are a small Catholic liberal arts college committed to Christian ideals and values. We believe
>
> —that God has entered our world, showing us in the Person of Jesus Christ the way to become most fully human, . . .
>
> "We seek to graduate persons who
>
> . . .
>
> —realize more fully their responsibility to work for a renewed Christian world, . . ." (Cat. at 11-13).

Two Catholic chapels are located on campus and Christian religious symbols appear on the buildings. (Cat. at 4 and 7). Most of the classrooms contain crucifixes. (Ans.) (R. 73). More than 90% of the faculty is estimated by the college to be Catholic (Ans.) (R. 72) and some teach while wearing religious veils. (Coll.Depo. at 70). More than 50% of the students are Catholic. (Stip. ¶ 48) (R. 123). Classes are occasionally begun with a prayer. (Coll. Depo. at 67-68).

Students are required to take two theology courses (Stip. ¶ 51[e]) (R. 124-125). Members of religious orders receive tuition discounts. (Cat. at 20). The college received $224,-561.00 during the academic year 1974-75 as contributed services from faculty who are members of religious Orders. (Stip. Ex. 14) (R. 153).

The "Theology" courses offered place heavy emphasis upon Catholicism and Christianity and include courses such as the following: "The Mystery of Christ", "The Christian Call", "Theology of the Sacraments", "Theology of the Eucharist", "Christian Worship", "The Catholic Church" and "The Church Today". (Cat. at 57-61). With the sole exception of "Music", the department of Theology offers a variety and number of courses which is twice as large as any other area of study offered at the college. The "Theology" offerings are one and one-half times the number of offerings in "Music". (Cat. at 24-61). "Students in these various courses are frequently exposed to Catholic thought and belief." (Coll.Depo. at 170). Holy Thursday afternoon and Good Friday are official college holidays. (Coll.Depo. at 72).

Seven of the eight members of the Administration are members of the Order and every member of the Administrative Council of the Coordinating Council, of the Committee on Admissions, and of the Committee on Financial Aid are members of the Order. (Cat. at 76 and 78). Thirty-five of 36 faculty

members are members of the Order and the sole exception, a Reverend, holds a Masters in Divinity from St. Meinrad School of Theology. (Cat. at 72-75).

Between ten to 12% of the student body are members of religious Orders. (Coll.Depo. at 17). Mass is celebrated twice weekly in the worship room by a priest who is a full-time faculty member. (Coll.Depo. at 18).

10. Rockhurst College was founded by the Society of Jesus (Cat. at 5) and is presently controlled by a Board of Trustees composed of nine members, one of whom is to be the President, another who is to be the Dean of the College and three members who are to be designated by the Provincial of the Missouri Province of the Society of Jesus. (Stip. ¶24) (R. 117). At present, there are eight members of the Board, all of whom are Jesuits. (Stip. ¶24) (R. 117).

The "Objectives" of the college include statements that as "A community of learning, Rockhurst is a liberal arts college, Catholic and Jesuit." (Cat. at 5).

> "Because the College considers vital the search to understand the Christian faith, Rockhurst emphasizes philosophy and theology as intellectual disciplines in consideration of these questions.
>
> "*As a Catholic college, a community of faith,* Rockhurst seeks to quicken the religious growth of each student, especially through personal influence and a climate that supports this expansion. The observance of liturgical worship and other practices of Christian life on campus are manifestations of Rockhurst's nature as a community of faith. In the spirit of Christian brotherhood, the College encourages participation in liturgical services particularly adapted to students." (Cat. at 6).

The "Credo" of the college provides, in part, "We believe (i)n following the teachings of Christ." (Cat. at 157). The "Educational Philosophy" of the college includes the goal "to provide educational programs that lead to Christian values and Christian commitment." (Cat. at 11).

The President of the college is required to be a Jesuit. (Stip. ¶37) (R. 120). Many buildings and classrooms contain crosses. (Cat. at 10). Many of the faculty and administration wear clerical garb. (Cat. at 10, 55, 91, 141, 143 and 150).

There is on campus a Blessed Mother Shrine and four chapels. (Ans.) (R. 76). College is not conducted on Good Friday and the same is declared a holiday. (Cat. at 160).

During the academic year 1974-75, a total of $234,000.00 was received as contributed services by the college from faculty who are members of Catholic religious Orders. (Stip. Ex. 14) (R. 153).

"The Christian Life at Rockhurst" includes the following:

> "*Liturgy*. The College enthusiastically supports and recommends the many liturgical opportunities sponsored by different groups and currently available on the campus. It is certainly appropriate for a Catholic college to function as a center of liturgical vitality. In this regard, Rockhurst College is striving to discover meaningful ways for the Christian student to worship in community. Descriptions and schedules of the various liturgies are available from the Coordinator of Campus Ministry. Besides the regularly scheduled Masses, opportunities are available for communal and individual penance services. Different groups of students are involved in planning the various liturgies on campus.
>
> "*Retreats*. Although they are not required, the College strongly recommends participation in retreats and renewals which help to foster personal spiritual growth." (Cat. at 11-12).

The college requires a student to complete three courses in theology or religious studies, one of which must be Theology 10 —"Christ in the Scriptures" (Stip. ¶51[f]) (R. 125).

The only departments of study offering a greater variety of courses than the "Department of Theology and Religious studies" are the fields of Business Administration, English, Philosophy and Psychology. (Cat. at 74-135). The Department of Theology and Religious Studies places a heavy emphasis on Catholicism and Christianity, beginning with the premise that "(t)he nature of Theology requires that Theology begin with faith in the Christian mystery." (Cat. at 132). It includes such course offerings as "Christ in the Scriptures", "Christian Marriage", "The Shape of Christian Worship", "The Church in the Modern World", "Catholic Thelogy Since Vatican I", "The Church in Council" and "Preliminaries for Christian Proclamations". (Cat. at 132-135).

The college conducts a special "Honors Program", "designed to help the superior student attain Christian wisdom to the fullest possible extent . . . with . . . (i)ntensive and thorough studies in philosophy and theology . . . to . . . correlate knowledge into a Christian wisdom." (Cat. at 47).

Twenty-three percent of the faculty are members of Catholic religious Orders. (Cat. at 141-150). The six man Board of Directors of the College is composed entirely of Jesuits. (Cat. at 137).

11. St. Louis University (College of Arts and Sciences) was founded by the Catholic Society of Jesus (Jesuits). (Cat. at 25). At least 11 members of the Board of Trustees are required to be Jesuits (Ans.) (Tr. 80) and nine of the present 29 members of the Board are members of Catholic religious Orders, accord-

ing to the catalog listing (Cat. at 9-10) or 13 Jesuits among the 36 members, as provided in the "Stipulation". (Stip. ¶25) (R. 117).

The President of the college is required to be a Jesuit. (Stip. ¶37) (R. 120). The "Creed" of the University provides, in part,

> "We believe in God.
>
> . . .
>
> "We believe, briefly, in the teachings of Christ . . ." (Cat. at inside cover).

Among the "Purposes and Aims" of the college, as stated, are.

> "The ultimate dedication of the University, one shared with all Catholic and Jesuit institutions, is a dedication to the greater glory of God, to the service of the Catholic Church, and to the temporal and eternal well-being of all men." (Cat. at 27).

"EACH INDIVIDUAL STUDENT at Saint Louis University is encouraged to give serious thought and effort to his own development as an active and mature Christian. It is understood that the Christian life of an educated person will have a sound intellectual foundation in theology and related disciplines. The concerned Christian will also strive to deepen his religious commitment through activities, both spiritual and apostolic, which tend toward the active witness which he must make in the modern world.

. . .

> "1. The University enthusiastically supports and recommends the many liturgical opportunities sponsored by different religious groups and currently available on the campus. It is certainly appropriate for a Catholic university to function as a center of liturgical vitality according to the spirit of the Second Vatican Council and the directives of the hierarchy. . . .
>
> "2. Although they are not required, the University strongly recommends participation in retreats and renewals which help to foster Christian growth." (Cat. at 47).

Approximately 60% of the faculty is Catholic (Stip. ¶45) (R. 122), 50% of the student body is Catholic (Stip. ¶48) (R. 123) and the college is closed for Good Friday. (Cat. at 13).

Nine hours of theology are required of all students. (Stip. ¶51[g]) (R. 125). Sixteen of the 20 faculty members of the "Theology" department are members of Catholic religious Orders. With the exception of all courses covering the total range of foreign languages under the departmental heading of "Modern Languages", the department of "Theology" offers an overwhelmingly larger variety of course offerings than any other department of study. (Cat. at 100-221). The courses in Theology heavily favor Christianity and Catholicism and include courses such as, "Theology of Christian Worship", "Eucharistic Spirituality", "Theology of Marriage", "The Mystery of Christ in Time: The Sacraments", "Christology: Modern Thought on Christ", "Twentieth Century Theologians and Christ", "Theology of Grace", "The Christian View of Man", "The Development of Christian Dogma" and "The Christian and Revolution". (Cat. at 209-218).

At least five Catholic chapels are located on the college campus and there are several statues of the Virgin Mary on campus. (Ans.) (R. 81).

During the academic year 1974-75, the college received contributed services by faculty who are members of Catholic religious Orders in the amount of $665,452.00. (Stip.Ex. 14) (R. 153).

12. St. Mary's College of O'Fallon is operated by the Catholic Order of the Congregation of the Most Precious Blood. The Board of Trustees consist of nine members, four of whom are prohibited from being members of the specific Order. Two-thirds of the Board members belong to Catholic religious Orders and five members are members of the Congregation of the Most Precious Blood. (Cat. at 7) (Stip. ¶ 26) (R. 117-118).

The "Philosophy of St. Mary's College" provides, in part,

> "Believing that without God there is no ultimate purpose in life, while respecting the right of the individual conscience, St. Mary's College encourages its students to see all truth in the light of Christian principles in forming their own personal goals.
>
> "That its overall goals may be attained as fully as possible, St. Mary's College proposes as its specific objectives:
>
> —to deepen the spiritual dimension of life as a stabilizing force within a world of ever changing values by illuminating the pursuit of knowledge with the light of Christian wisdom.
>
> —to explore the relevation of God's word and its influence upon man's relationships with others in a way that reflects the Christian concept of respect for the dignity of the human person . . ." (Cat. at 4-5).

The President of the college is appointed by the Superior General of the Sisters of the Most Precious Blood. (Amend. Ans.) (R. 105). Forty-nine percent of the faculty are members of Catholic religious Orders. (Cat. at 8-10). There is a Catholic chapel on campus and a crucifix upon every classroom wall. (Ans.) (R. 83).

Students are required to take one Theology-related course. (Cat. at 23) (Stip. ¶ 51[h]) (R. 125).

13. St. Paul's College is under the sponsorship and ownership of the Lutheran Church, Missouri Synod. It is under the direction and control of a local Board of Control composed of five members, each of whom must be a Lutheran (Deposition of Dr. Walter Rosin [Ros.Depo.] at page 20) and must be elected by members of the Lutheran Church, Missouri Synod. (Stip. ¶ 12) (R. 118) (Ros.Depo. at 16-17). The college is supported by the Lutheran Church—Missouri Synod (Cat. at 8) and for the fiscal year 1973-74, received 39% of its total revenues from the Synod. (Ros.Depo. at 11-14).

The college offers an education "with a distinctive Christian orientation". (Cat. at 8). As its "General Objectives" it strives to have the student become a person who "(m)atures in his Christian faith and life". (Cat. at 8).

> "Viewing student life and services at St. Paul's College, a basic assumption is that the total learning experience on a *Christian* campus includes commitment to a resulting way of life—a Christ-centered way of living with others, based upon the forgiveness and love of our Savior. That assumption points clearly to a dual responsibility between the students and the school.
>
> . . .
>
> "The school, on the other hand, must provide well planned experiences which appeal to the understanding and will of the student while at the same time promoting discipleship in Christ. In such matters, then, as corporate chapel worship, other devotions, campus activities and dormitory living, St. Paul's is expected to offer necessary guidance." (Cat. at 39).

Eight semester hours of religion are required of each student. (Stip. ¶ 51[k]) (R. 125). With the exception of the departments of "English", "Foreign Languages", "Music" and "Social Studies", the department of Religion offers a greater variety of

courses than any other department. (Cat. at 25-38). The Religion courses place a heavy emphasis on Lutheranism and Christianity and include such courses as, "Introduction to Lutheran Confessional Theology", "Christian Ethics", "Understanding the Reformation" and "Introduction to Christian Doctrine". (Cat. at 34-35).

Daily Lutheran chapel services, with hymns from Lutheran Hymnal, are held and students are encouraged to attend. (Ros. Depo. at 68-69, 106). Christian religious symbols appear on campus (Cat. at 2 and 6) and throughout the catalog itself. (Cat. at 11, 13, 17, 39, 45 and 53) (Ros.Depo. at 27 and 45).

Many scholarships restricted to Lutherans are offered to students. (Cat. at 48-51). Students who sign a "Declaration of Intent" to enter full-time church work are granted a $200.00 tuition remission. (Cat. at 14) (Ros.Depo. at 34-36). More than half of the students sign such "Declaration of Intent." (Ros.Depo. at 36).

A preference policy for students who are members of Synod churches exists. (Res.Depo. at 32-33). A breakdown of student registrations shows 39% of first-year students and 44% of second-year students directly enrolled as Ministerial, Deaconess or Director of Christian Education students. (Cat. at 57).

The President of the college is required to be a church member of the Synod (Stip. at 14) and the President considers himself to be an administrator in the college hierarchy. (Ros.Depo. at 41).

It is the college President's opinion that more than 50% of the students are Lutheran. (Ros.Depo. at 57-58). The entire faculty, with only one exception, is of the Lutheran faith. (Ros. Depo. at 64-68).

There exists a Lutheran influence at the college. (Ros.Depo. at 79-81). "The major emphasis of the College continues to

be the preparation of professional church workers," meaning "Lutheran church workers." (Ros.Depo. at 98-99). "The primary function of the College is that of providing initial education necessary for the pastoral and teaching ministries of the Gospel of Christ." (Ros.Depo. at 104). Another goal is that students develop a love, understanding and belief in the "Godliness and spirituality and divinity of Jesus." (Ros.Depo. at 184). Prayers have been offered in classes by faculty. (Ros. Depo. at 108).

A cause for removal of a faculty member is "False doctrine," defined as "a religious doctrine contrary to that advocated by the Synod." (Ros.Depo. at 176-179).

The President of the college considers the college to be "denominational" and to have a "Christian atmosphere" which "includes a belief in Christ." (Ros.Depo. at 191-192).

14. The School of the Ozarks was founded " 'to provide the advantages of a Christian education for youth of both sexes . . .' " (Cat. at 6).

Among the "Aims and Objectives" is to develop spiritual growth,

> " '*Spiritual Growth*' comprehends that total development of the Christian personality which brings, without regard to economic conditions, the life more abundant. Thus, the teaching of the data of Christian faith is so designed as to give each student a working knowledge of the Bible and the history of Christianity. In choosing faculty and staff members preliminary consideration is given to their Christian convictions and experience in the expectation that these will mark their teaching and their contacts with students. It is expected that life on the college campus will lead each student into an increase of his Christian experience." (Cat. at 4-5).

"Spiritual growth is encouraged by a wide range of religious activities including weekly chapel services in which students take an active role, campus religious organizations, and an annual Christian Emphasis Month. . . . (A)11 on-campus students are required to attend chapel services . . ." (Cat. at 10).

Two chapels are located on campus and "(s)tudents may serve as ushers, members of the Board of Deacons or Board of Elders, sing in the college choir and assist the minister in weekly chapel and Sunday worship services." (Cat. at 11).

To foster the development of "a personal understanding and appreciation of the Christian philosophy of life", each student must take a minimum of six credit hours in Religion. (Cat. at 44). The Religion courses place great emphasis on Christianity and include courses such as "The Teachings of Christ," "Life and Letters of Paul," and "History of the Christian Church." (Cat. at 144). The college received during 1974, $6,334.97 from the Synods of Mid-America of the Christian Church (Disciples of Christ). (Ans.) (R. 86).

15. Southwest Baptist College is owned and operated by the Missouri Baptist Convention. Control is vested in a 24 member Board of Trustees, all of whom are elected by the Missouri Baptist Convention. (Cat. at 2). The President of the college must be a member of a church affiliated with the Convention. (Stip. ¶ 38) (R. 120).

"The Objectives of the College" include "challenging the student to integrate the essence of the Christian faith into his whole college experience." (Cat. at 15). "A primary goal of Southwest Baptist College is to provide quality Christian higher education . . .". (Cat. at 13).

"Southwest Baptist College creates scholarships by the reduction of college costs for certain students. Therefore,

the recipients of scholarships should demonstrate fidelity to the college, the churches, the denomination, and these Christian ideals . . ." (Cat. at 17).

Many scholarships are restricted to Baptist students and those planning careers in the ministry. (Cat. at 19-23).

The college discriminates on the basis of sex by permitting male students to smoke tobacco, while prohibiting smoking by female students. (Cat. at 35).

Students are required to attend convocation services held thrice weekly, frequently of a religious nature (Cat. at 29) and the college requires each student to complete six credit hours in Christianity. (Stip. ¶ 51[j]) (R. 125).

The college offers the following major and minor areas of concentration: Christianity, Church Music and Church Recreation; and with the the exception of the Education and Music departments, a greater variety of courses are offered in the Biblical Studies department than any other area. (Cat. at 55-108).

The Biblical Studies department places a great emphasis on Christianity and particularly, the Baptist religion. Course offerings include, "The Baptist Denomination," "Introduction to Missions," "Revelation and the Bible," "Christology," "Christian Doctrine," "Christian Worship" and "Communication of the Christian Message," "Early Pauline Epistles," "Later Pauline Epistles" and "Church History I and II." (Cat. at 63-66).

16. "Tarkio College has a historical relationship with the United Presbyterian Church in the U.S.A." (Cat. at 2).

"Tarkio College seeks to develop students who:

. . .

—understand Christian heritage and doctrine.

. . .

"Tarkio College seeks to have a campus community . . . which:

. . .

—help individuals develop a Christian life style.

. . .

"Tarkio College, with the larger community seeks to:

. . .

—work with the Church in its mission." (Cat. at 3).

The college requires each student to take one course in Christianity (Stip. ¶ 51[n]) (R. 125-126) (Cat. at 32). With the sole exception of Music, the area of Religion offers a greater variety of courses than any other single area of study. (Cat. at 34-62). A great emphasis is placed upon Christianity and courses offered include, "Christian Philosophy of Life," "God, Christ and Man in the New Testament," "Life and Teachings of Christ," "Acts and Letters of the Apostles," "Christian Doctrine," "Christian Heritage" and "History of the Christian Church." (Cat. at 35-36).

> "Transfer students with A.A. degrees will be accepted as having met all Tarkio College foundation requirements with the possible exception of a course in Christianity." (Cat. at 7).

The college grants the "Lynn-Marlin Prize in Religion" to the graduating senior who "has done the most outstanding work in the field of religion." (Cat. at 17).

The college received for the years 1972, 1973 and 1974 an average annual sum of $23,881.99 from Presbyterian U.S.A. Churches and Presbyterian U.S.A. Church bodies. (Ans.) (R. 90).

17. William Jewell College maintains a fraternal relationship with the Missouri Baptist Convention. (Stip. ¶ 27) (R. 118).

"William Jewell College is a Christian institution . . . encourag(ing) responsible Christian participation in contemporary society . . .". (Cat. at 3). "A Purpose" of the college is,

> *"To be an institution with unquestioned loyalty to the ideals of Christ, which includes a Christian philosophy in teaching and in daily living on the campus.* The college aspires to be a community in which the Christian commitment of the members exemplifies the compatibility of sound scholarship and the Christian faith, and demonstrates its worthiness as a way of life. In keeping with this viewpoint the individual is challenged to develop a worthy code of conduct for his life which should inspire him to meaningful involvement with his fellow man.
>
> *"To cooperate thoroughly with the Missouri Baptist Convention to offer the finest Christian education possible.* As a church-related institution, William Jewell College, founded in 1849 by the Baptists of Missouri who have continued to provide financial support, aims to serve the denomination and to emphasize the best in its Baptist heritage. The college helps train leaders, both professional and non-professional, for the denomination and seeks new methods of communicating the Christian faith to each generation." (Cat. at 144).

The college requires all faculty members to be members of an evangelical church. Approximately 75% of the full-time faculty are Baptists. (Ans.) (R. 98). Approximately 58% of the students are Baptists. (Stip. ¶ 48) (R. 123) (Ans.) (R. 98).

The college, during 1974, received $300,036.00 in funds from the Missouri Baptist Convention. (Ans.) (R. 99). All 24 members of the Board of Trustees are Baptists. (Cat. at 123-127).

With the exception of the Education, English and Music departments, the Religion department offers a greater variety of courses than any other area of available study. Such courses heavily emphasize Christianity and include, "Biblical Studies in Christian Faith", "Jesus and the Gospels", "American Christianity", "Religious Revolution and Change in Christian History", "The Christian Faith and Modern Man", "Christianity and Contemporary Issues", "The Early Church and Paul" and "The Church and its Hymnody". (Cat. at 118-121). Each student is required to take one course in religious studies. (Stip. ¶ 51 [i]) (R. 125).

IV. **An Overview of the Tainted Approved Institutions**

Merely because the tainted colleges offer liberal arts degrees does not demonstrate that their mission is an educational, rather than a religious one. The two missions are not mutually exclusive. Petitioners never challenged the fact that the dual purposes function simultaneously nor that said colleges may well have a primary, educational purpose.

While it is undoubtedly true, as respondents suggested below, that certain portions of the curriculum at the tainted colleges are indistinguishable from selected offerings at nonsectarian colleges, it is also true that those portions of the catalogs of the 17 tainted colleges, which are clearly distinguishable from the nonsectarian college catalogs, set them apart and outside the pale of eligibility for constitutionally permitted financial assistance. There exists no difficulty, even by cursory perusal of the college catalogs of all "approved private institutions", in selecting out those with a religious mission.

The fact that the tainted colleges may subscribe to certain principles of academic freedom has no bearing nor relevance to the college's selection of faculty or upon any individual faculty

member's choice of material for or method of classroom presentation. In fact, such academic freedom permits, *per se*, the choice of material and presentation to be within the sole discretion of the instructor. Academic freedom demands the right to instruct how and what an individual teacher may choose. For example, at Evangel College where 87% of the faculty belong to Assemblies of God Churches, at St. Paul's College where all faculty members save one are Lutherans and at Notre Dame College where more than 90% of the faculty are Catholic (Stip. ¶ 45) (R. 121-122); a religious "bias", at a minimum, is inevitable in classrooms during sectarian courses and discussions. The inability of teachers to possess two totally separate and distinct roles, secular and sectarian, has been recognized by this Honorable Court. See: *Lemon*, et al. v. *Kurtzman*, etc., et al., 403 U.S. 602, 618-619 (1971). No rational distinction can be made among teachers' biases on the basis of the educational level of their employing institution.

In addition to the Board of Trustees at four of the colleges which admittedly are not free of sectarian responsibility (Stip. ¶¶ 27, 28, 29) (R. 118), the Boards of at least eight other tainted colleges are heavily weighted in specific religious composition. (Stip. ¶¶ 20-26, 30) (R. 116-119). Can it be seriously suggested that this serves no denominational intent or that this inevitably does not create a sectarian atmosphere that fosters the particular sect's briefs and purposes in the sustaining of the colleges?

Respondents erroneously maintained below that in all "approved" colleges, there is no compulsory chapel attendance and no policy of prayer in the classroom. This is totally contrary to the facts. See: Stip. ¶¶ 51, 52; R. 124-126; Coll.Depo. at 67-68; and Ros.Depo. at 68-69, 106. Even those colleges where religious observance is offered but not actually mandated, do not escape the constitutional requirement, for they blatantly ignore this Honorable Court's ruling on such practices in schools

where pupil participation also was not obligatory. *School District of Abington Township, Pennsylvania,* et al. v. *Schempp,* et al., 374 U.S. 203 (1963). "Neither the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of the students is voluntary can serve to free it from limitations of the Establishment Clause . . ." *Engel,* et al. v. *Vitale,* et al., 370 U.S. 421, 430 (1962).

The requirement of chapel attendance, although permitting students to be excluded upon request, has been declared constitutionally infirm on the public college level, as well. See, *Anderson,* et al. v. *Laird,* etc., et al., 466 F.2d 283 (1972), *cert. denied,* 409 U.S. 1076 (1972).

Although it is true, as respondents contended, that some public and private nondenominational colleges offer some religious courses, the content and disproportionate relative quantity of such courses is clearly distinguishable by even a brief examination of the catalogs of the 17 tainted colleges and those of the public and private non-denominational colleges of Missouri. None of the latter institutions require religious courses.

ARGUMENT

The Statutory Scheme Contained in Missouri Revised Statutes, Sections 173.200 to 173.235, Providing College Tuition Grants to Students Attending Sectarian Colleges, and Containing No Restrictions on the Sectarian Use of Such Funds by the Sectarian Colleges Attended, Violates the First and Fourteenth Amendments of the United States Constitution.

I. The Burden on Respondents

Respondents mistakenly sought throughout this litigation to place a heavy burden upon petitioners in this challenge. This fallacious reversal of roles in this action is legally unsound.

In the area of First Amendment fundamental rights, the heavy burden has always lain with respondents.

> "Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest.' " *Roe* et al. v. *Wade,* etc., 410 U.S. 113, 155 (1973). See: *Paris Adult Theatre I,* et al. v. *Slayton,* etc., et al., 413 U.S. 49, 65 (1973).

This principle is particularly applicable when "one's beliefs, ideas, politics, religious, cultural concerns, and the like" become involved, a situation clearly present at bar. *The California Bankers Association* v. *Schultz,* etc., et al., 416 U.S. 21, 86 (1974).

This case does not involve a balancing of two conflicting fundamental rights, for this Honorable Court has held that,

> "Education, of course, is not among the rights afforded explicit protection under our Federal Constitution" . . . (nor is education) "a fundamental right or liberty". *San*

Antonio Independent School District, et al. v. *Rodriguez*, et al., 411 U.S. 1, 35, 37 (1973).

In addition, the burden in cases involving state aid to religious schools is that the state "must be certain, given the Religion Clauses" that the Constitution is obeyed. *Lemon*, et al. v. *Kurtzman*, etc., et al., 403 U.S. 602, 619 (1971).

The Courts have consistently made clear that the burden of ensuring compliance with the First Amendment religious proscriptions is upon the states, not upon those asserting the invasion of their guaranteed rights. In *Lemon, supra*, this Honorable Court, in prohibiting salary supplements for teachers of secular subjects in non-public schools, held,

> "The Rhode Island Legislature has not, and could not, provide state aid on the basis of a mere assumption that secular teachers under religious discipline can avoid conflicts. The State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion." 403 U.S. at 619.

This interdiction has been oft-times repeated, particularly under programs providing for the closely related situations of tuition reimbursement, tuition grants and/or tax benefits to students or parents of students attending nonpublic schools, indistinguishable from the program herein challenged.

> "The requirement that the public aid provided parochial schools be used only for secular and neutral purposes has been strictly construed. There are no restrictions on the face of Section 3317.062 O.R.C. or the guidelines promulgated thereunder to insure that the public moneys provided to parents will not ultimately be used for religious purposes. . . . Even if a theoretical requirement of neutrality or secularism can be read into this vague concept,

> the statute fails to provide any mechanism to insure that the implied secular purpose is achieved.
>
> . . .
>
> "Furthermore, this standard has been interpreted, in the guidelines promulgated under the authority of the statute by the State Department of Education, to allow parents to be reimbursed for . . . tuition. It cannot be argued that money paid as tuition to a parochial school is neutral, nonideological or 'atmosperically indifferent on the score of religion.' See, Freund, Comment, Public Aid to Parochial Schools, 82 Harv.L.Rev. 1680 1683 (1969). Tuition forms the major part of a school's general fund and moneys derived from it can be used for any purpose it deems legitimate. Such funds may be used for the construction of a chapel as well as a gymnasium; for the purchase of religious icons as well as laboratory test tubes. At no time have defendants denied that these funds will benefit the denominational schools." *Wolman*, et al. v. *Essex*, et al., 342 F.Supp. 399, 413-414 (S.D. Ohio 1972), *affirmed*, 409 U.S. 808 (1972).
>
> "New York's tuition reimbursement program also fails the 'effect" test, . . .
>
> "In the absence of an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes, it is clear from our cases that direct aid in whatever form is invalid.
>
> . . .
>
> "The tuition grants here are subject to no such restrictions. There has been no endeavor 'to guarantee the separation between secular and religious educational functions and to ensure that State financial aid supports only the former.'" *Committee For Public Education & Religious*

Liberty, et al. v. *Nyquist*, etc., et al., 413 U.S. 756, 780, 783 (1973).

Similarly, is: *Sloan*, etc., et al. v. *Lemon*, et al., 413 U.S. 825 (1973), voiding tuition reimbursements for costs of attending nonpublic schools; *Kosydar*, etc., et al. v. *Wolman*, et al., 353 F.Supp. 744 (S.D.Ohio 1972), *affirmed* per curiam, sub nom. *Grit*, et al. v. *Wolman*, et al., 413 U.S. 901 (1973), voiding tax credits for parents of nonpublic school pupils; and *Franchise Tax Board of California*, et al. v. *United Americans for Public Schools*, et al., 419 U.S. 890 (1974), affirming a district court decision voiding tax reduction for parents of nonpublic school pupils.

While *Lemon*, *Wolman*, *Nyquist*, *Sloan*, *Kosydar*, and *Franchise Tax Board*, *supra*, dealt with elementary and secondary schools (the latter five cases dealing specifically with tuition costs), the shibboleth against permitting the *potential* use of public funds for sectarian purposes has also been equally applied on the college level.

In *Tilton*, et al. v. *Richardson*, etc., et al., 403 U.S. 672 (1971), a five to four decision permitting grants to church-related colleges for constructing buildings and facilities to be used exclusively for secular educational purposes, this Honorable Court, eight members concurring, held invalid the expiration of the restrictive use clause after 20 years. This Honorable Court first noted that none of the four colleges involved in the suit "requires its students to attend religious services" (403 U.S. at 686), a factual circumstance directly contrary to many of the approved colleges under the Missouri grant program. The Federal program was upheld on the basis of specific findings as to the identifiable "nonideological character of the aid", the nature of the "facilities that are themselves religiously neutral", the fact that "the Government aid here is a one-time, single-purpose construction grant" and that "(t)here are no continuing financial

relationships or dependencies, no annual audits, and no government analysis of an institution's expenditures on secular as distinguished from religious activities." 403 U.S. at 687-688.

Infringements of First Amendment concerns are threatened to a substantially lesser extent by the specific, secular construction grants in *Tilton*, *supra*, than by the across-the-board funding through tuition programs herein challenged. The same considerations which have prompted this Honorable Court to invalidate all post-*Tilton* aid, unless statutorily confined to secular purposes, necessitates a similar decision here.

The plurality decision in *Tilton*, *supra*, made clear that all construction grants to sectarian colleges were not constitutional. This Honorable Court noted that Connecticut state authorities had themselves held certain colleges ineligible for being denominational. 403 U.S. at 682. Only four specific colleges were examined and approved as to their sectarian control and influence in *Tilton*, *supra*.

The fact that *Tilton*, *supra*, involved college level education does not alter the basic tenets by which state aid must be measured; other than in the specific field of one-time, single-purpose, construction grants. This is apparent from a reading of the decision which places the emphasis upon the nature of the aid received and not upon the nature of the recipient. There is no manner by which the tuition under the challenged program can or is being segregated between the costs of a tainted college's sectarian functions and the costs of a tainted college's secular functions. Reaffirming the applicability of traditional elementary and secondary church-state school case constitutional standards to colleges is the fact that both *Hunt v. McNair*, etc., et al., 403 U.S. 945 (1971) and *Kervick*, etc. v. *Clayton*, et al., 403 U.S. 945 (1971) were remanded for reconsideration, not only in light of *Tilton*, *supra*, but also in light of two elementary and secondary school aid companion decisions. *Lemon*, *supra*, and *Earley*, et al. v. *DiCenso*, et al., 403 U.S. 602 (1971).

The aid in question here does not comport with the approved parameters of *Tilton, supra*, for it is neither "a one-time, single-purpose construction grant"; instead, there exist "continuing financial relationships or dependencies", "annual audits" are required for compliance and there exists a need to satisfy constitutional comportment of "governmental analysis of an institution's expenditures on secular as distinguished from religious activities." 403 U.S. at 687-688.

In the tuition and tax credit cases, this Honorable Court made clear that unrestricted moneys could too easily assume a sectarian purpose and be put to denominational use, in the absence of stringent and constitutionally required statutory safeguards. This Honorable Court recently affirmed this principle in *Meek*, et al. v. *Pittenger*, etc., et al., 421 U.S. 349 (1975). Two years following *Tilton, supra*, this Honorable Court made abundantly clear that the acceptability of the carefully delineated type of assistance therein permitted was in no manner an invitation to all forms of aid at the college level. In *Nyquist, supra* (1973), the burden upon the state to guarantee that state funds could not be used for sectarian purposes remained the standard and the fact that the standard was applicable, as well, to the college level was reiterated.

> "Any remaining question about the contours of the 'effect' criterion were resolved by the Court's decision in *Tilton*, in which the plurality found that the mere possibility that a federally financed structure might be used for religious purposes 20 years hence was constitutionally unacceptable because the grant might *'in part* have the effect of advancing religion.' 403 U.S., at 683 (emphasis supplied)." 413 U.S. at 784, at n. 39.

No such restriction appears in the Missouri statutory program, herein challenged.

Most recently, is this Honorable Court's decision in *Roemer*, et al. v. *Board of Public Works of Maryland*, et al., — U.S. —

(1976), 96 S.Ct. 2337, 49 L.Ed.2d 179, upon which the Missouri Court chiefly, although incorrectly, relied. Petitioners maintain that the Missouri Supreme Court erroneously looked only to the result in *Roemer, supra*, and did not examine the rationale and the language of the decision.

Petitioners maintain that facial constitutionality is not achieved unless an express requirement statutorily exists of secular or of non-sectarian use of the funds. This is clearly the lesson of *Roemer, supra*.

As the three-member plurality stated, "The State must confine itself to secular objectives . . .". 96 S.Ct. at 2345, 49 L.Ed.2d at 188. The plurality noted in regard to the eight-member majority decision in *Tilton, supra*, to strike the lapse of sectarian restriction after 20 years, that,

> "The restriction, as imposed, was to remain in effect for 20 years following construction. Since the Court could not approve the facilities' sectarian use even after a 20-year period, it excised that time limitation from the statute." 96 S.Ct. at 2346, at n. 17, 49 L.Ed.2d at 190, at n. 17.

If the Missouri Supreme Court is correct that facial constitutionality does not require specific prohibition against sectarian use and that such prohibited use is challengeable only under an attack upon the statute's unconstitutional application, then the action by this Honorable Court in *Tilton, supra*, regarding a speculative prohibited use some 20 years hence, is unexplainable.

In fact, it is clear as this Honorable Court noted, ". . . in *Tilton, supra*, state aid went to secular facilities only . . .". 96 S.Ct. at 2347, 49 L.Ed.2d at 191. The plurality in *Roemer, supra*, further noted that in *Hunt* v. *McNair*, etc., et al., 403 U.S. 945 (1971), it was required "that state funds not be used to support 'specifically religious activity'." 96 S.Ct. at 2351,

49 L.Ed.2d at 195. The *Roemer* plurality repeated the command of *Tilton, supra,* and stated that,

> "*Hunt* requires (1) that no state aid at all go to institutions that are so 'pervasively sectarian' that secular activities cannot be separated from sectarian ones, and (2) that if secular activities *can* be separated out, they alone may be funded." 96 S.Ct. at 2349, 49 L.Ed.2d at 193.

This Honorable Court has always spoken in terms of potential misuse of funds, not actual misuse. The *Roemer* plurality in discussing *Committee for Public Education & Religious Liberty,* et al. v. *Nyquist,* etc., et al., 413 U.S. 756 (1973), found the aid to have been unconstitutional merely because it, "being unrestricted, *could* be used for . . . religious instruction . . . (or) to support wholly religious activity." (Emphasis supplied.) 96 S.Ct. at 2348, 49 L.Ed.2d at 191.

Never has this Honorable Court nor any state Supreme Court approved a flow of funds, directly or indirectly to sectarian related colleges, without express statutory restrictions against their sectarian use. Federal and state cases to the contrary are legion. The two-member concurring opinion of the United States Supreme Court in *Roemer, supra,* also required that the state be,

> ". . . 'financing a separable secular function' . . . and that the aid at issue was capable of, and is in fact, extended only to 'the secular side' of the . . . colleges' operations." 96 S.Ct. at 2355, 49 L.Ed.2d at 200.

As stipulated by the parties herein,

> "Neither the statute nor the regulations of the Department require an approved institution to segregate any funds which may be paid to it by a student who has received financial assistance under the Program." (Stip. ¶10) (R. 112).

II. Substance and Not Form

The form of the assistance to the sectarian nonpublic college is not decisive nor capable of avoiding the constitutional constraints against such economic benefit. As noted by this Honorable Court regarding tuition schemes at the elementary or secondary levels,

> "Payment to the parent for transmittal to the denominational school does not have a cleansing effect and somehow cause the funds to lose their identity as public funds. While the ingenuity of man is apparently limitless, the Court has held with unvarying regularity that one may not do by indirection what is forbidden directly; one may not by form alone contradict the substance of a transaction." *Wolman,* et al. v. *Essex,* et al., 342 F.Supp. 399, 415 (S.D. Ohio 1972), *affirmed,* 409 U.S. 808 (1972).

> "As MR. CHIEF JUSTICE BURGER'S opinion for the Court in *Lemon* v. *Kurtzman,* 403 U.S., at 614, notes, constitutional analysis is not a 'legalistic minuet in which precise rules and forms must govern.' Instead we must 'examine the form of the relationship for the light that it casts on the substance.'" *Committee for Public Education & Religious Liberty,* et al. v. *Nyquist,* etc., et al., 413 U.S. 756, 789-790 (1973).

> "But if novel forms of aid have not readily been sustained by this Court, the 'fault' lies not with the doctrines which are said to create a paradox but rather with the Establishment Clause itself: 'Congress' and the States by virtue of the Fourteenth Amendment 'shall make no law respecting an establishment of religion.' With that judgment we are not free to tamper, and while there is 'room for play in the joints,' *Walz* v. *Tax Comm'n, supra,* at 669, the Amendment's proscription clearly forecloses Pennsylvania's tui-

tion reimbursement program." *Sloan, supra,* 413 U.S. at 835.

"Nor do we think weight is to be accorded the fact that the money is paid to the pupil or parent and not to the school, for the pupil or parent is a mere channel." *Griffin,* et al. v. *State Board of Education,* et al., 239 F.Supp. 560, 563 (E.D.Va. 1965).

Again, respondents contended below that tuition payments are aid to the students and/or parents and not aid to the schools. Not only has this Honorable Court repeatedly rejected this notion on the elementary and secondary school levels, but each and every state supreme Court which has considered the notion has similarly rejected it on the college level. See: *Almond,* etc. v. *Day,* etc., 197 Va. 419 (1955), 89 S.E.2d 851; *Hartness* v. *Patterson,* etc., et al., 255 S.C. 503 (1971), 179 S.E.2d 907; *Weiss,* et al. v. *O'Brien,* etc., et al., 82 Wash. 2d 199 (1973), 509 P.2d 973; *Opinion of the Justices,* 291 Ala. 301 (1973), 280 So.2d 547; *State of Nebraska* ex rel. *Rogers* v. *Swanson,* etc., 192 Neb. 125 (1974), 219 N.W.2d 726.

This Honorable Court has unanimously held that,

"(T)uition grants directed to private school students, are a form of financial assistance inuring to the benefit of the private schools themselves." *Norwood,* et al. v. *Harrison,* et al., 413 U.S. 455, 463-464 (1973).

What was true in *Norwood, supra,* in the racial discrimination context, is no less valid under First Amendment review.

III. **The Argument of *De Minimus* Is Inapplicable**

This Honorable Court has held on several occasions that the amount of aid impermissible under the First Amendment is not a specific amount but any and all amounts. The Constitutional standard does not subject itself to a point of permissible *de minimus.*

"Yet the principle of the First Amendment is to prohibit the State from providing *any* funds which directly support or sponsor *any* church-related institution. This constitutional policy does not turn on the amount of aid a statute provided in any particular school year." *Wolman, supra,* 342 F.Supp. at 418, *affirmed,* 409 U.S. 808 (1972).

"Our cases, however, have long since foreclosed the notion that mere statistical assurances will suffice to sail between the Scylla and Charybdis of 'effect' and 'entanglement.'" *Nyquist, supra,* 413 U.S. at 787-788.

If partial tuition can be funded in the manner attempted herein, then logically total tuition for the same students and purposes, attending the same approved schools, could be provided under the program, should sufficient funds be available. Certainly, when viewed in this light, it can not seriously be maintained that the entire cost of education could be provided by public funds for attendance at or maintenance of the 17 tainted colleges.

IV. **Case Precedents**

In 1974, two federal district court panels, in addition to the District Court panel in *Roemer, supra,* had the opportunity to evaluate under First Amendment criteria, state statutory schemes involving financial grants to college students or colleges.

In *Americans United for Separation of Church and State,* et al. v. *Bubb,* etc., et al., 379 F.Supp. 872 (D. Kan. 1974), the District Court examined the participating colleges one by

one. After first weeding out certain colleges, the Court upheld the statute there under consideration valid for the remaining institutions. The District Court excluded St. John's College because it "reserves the right to give preference on enrollments" to members of supporting church congregations, excluded Sterling College, Tabor College and Hesston College "because of the requirement of religious participation by students" at chapel services and excluded Bethel College because it may test students as to "(t)opics related to Christian faith." 379 F.Supp. at 892. These exclusions were based upon indices of religious influence at the respective educational institutions, which are no greater and in many cases much less of a denominational, sectarian nature than the characteristics of many of the approved institutions under the Missouri grant program.

By way of comparison to the excluded Kansas colleges, the following above "approved" colleges directly or indirectly, through admissions, restricted scholarships or financial aid, prefer students of a religious background similar to the college: Central Methodist College, Culver-Stockton College, Evangel College, Hannibal-LaGrange College, Notre Dame College, St. Paul's College and Southwest Baptist College.

In addition to those colleges which overtly prefer students of a particular religious persuasion, the gross statistical disparities existing among many of the colleges' student bodies should not be overlooked. (See: Stip. ¶48 [Tr. 122-123]; and Stip. ¶45 [Tr. 121-122] as to faculty religious disparities.) A *prima facie* case is statistically made that preferences in violation of the statute (*Mo.Rev.Sta*t., §173.205[2][d]) exist.

Religious services are required, directly or indirectly, at Evangel College, Hannibal-LaGrange College, St. Paul's College and Southwest Baptist College.

Religious courses and instruction are required at Central Methodist College, Columbia College, Culver-Stockton College,

Evangel College, Hannibal-LaGrange College, Maryville College, Notre Dame College, Rockhurst College, St. Louis University (College of Arts and Sciences), St. Mary's College of O'Fallon, St. Paul's College, The School of the Ozarks, Southwest Baptist College, Tarkio College and William Jewell College.

No challenge was made as to the constitutionality of the program under the Kansas Constitution nor was the case appealed. Twenty-six percent of the eligible Kansas institutions were excluded by the District Court from participating in the program.

The District Court's self-assigned role in *Bubb, supra*, of picking and choosing eligible institutions, has never been accepted by any other Court, nor does it comport with the constitutional standards of requiring the enabling legislation to exclude statutorily and facially any opportunity for First Amendment violations.

In the instant case, it cannot rationally nor reasonably be suggested that a mere prohibition against "a degree in theology or divinity" (*Mo.Rev.Stat.* §173.215[6]) is sufficient, when the freedom to enroll in the numerous sectarian courses and to "major or minor in religion or theology" (Stip. ¶49) (Tr. 123) can be funded or paid for by Missouri tuition grant funds.

The second case is *Americans United for the Separation of Church and State*, etc., et al. v. *Dunn*, etc., et al., 384 F.Supp. 714 (M.D.Tenn. 1974), *prob. juris. noted*, sub nom. *Blanton*, etc., et al. v. *Americans United for the Separation of Church and State*, et al., 420 U.S. 917 (1975), "vacated and remanded . . . for reconsideration in light of statutory changes effected since the litigation was instituted", sub nom. *Blanton*, etc., 421 U.S. 958 (1975). In *Dunn, supra*, an unanimous three-judge federal panel declared that a Tennessee statute, providing tuition grants to students attending both public and private approved colleges, violated the Religion Clauses of the First Amendment. As under the Missouri statute,

"There are absolutely no restrictions on the use of the funds by the schools; indeed, it appears from the record that these funds are treated exactly like any other tuition payment." 384 F.Supp. at 717.

The Court held,

"Applying these guidelines to the facts in this case, we find that the constitutional issue is simply resolved, because the Tennessee statute does not pass muster under either of the primary distinctions. First, it cannot be said, on this record, that the funds disbursed under this program do not constitute aid within the meaning of the Establishment Clause so as to bring this case within the holding of Everson v. Board of Education, *supra*. The absence of restrictions in the statute, the facts concerning the operation of the program, and the actual disbursements made thereunder preclude such a finding. Second, the program cannot be upheld on the basis of the distinction between aid to the secular function and aid to the sectarian function because the Tennessee statute does not contain restrictions addressing such a distinction; for, even if the cases recognize a distinction between functions and, in pursuing this distinction, recognize one between higher and secondary education, such distinctions are irrelevant unless the statute itself, through the imposition of restrictions ensuring only secular use of the funds, makes the distinction. Herein lies the fallacy of the defendants' position and the position of the briefs filed by the two church schools; their arguments are based on distinctions which the statute does not address. Moreover, the fact that the use of State funds by the schools is not restricted renders the statute unconstitutional under the Establishment Clause if some of the eligible schools do perform a religious function, *e.g.*, engage in religious activity, because unrestricted aid to such schools would permit the use of such funds for support of religious activity.

"Thus, our constitutional inquiry is reduced to the simple factual question of whether some of the schools eligible for participation in the Tuition Grant Program have this dual secular-sectarian function and engage in religious activity. The evidence in this record overwhelmingly demonstrates that certain of the eligible schools engage in substantial religious activity, and the nature of such religious activity includes compulsory chapel attendance, formal prayer before each class, church membership requirements for faculty, and the like. Given the presence of such activity at certain of the eligible schools and the absence of restrictions in the statute, the only conclusions are that the statute permits the use of State funds for religious activity and therefore, that the statute is unconstitutional as violative of the Establishment Clause of the First Amendment. Levitt v. Committee for Public Education, *supra;* Committee for Public Education v. Nyquist, *supra.*" 384 F.Supp. at 721.

The only restriction in the Tennessee program, when invalidated by the Court, was identical to the present restriction under the Missouri program that "no student shall receive a grant who is enrolled in a course of study leading to a degree in religion, theology or religious education." (*Tenn. Code Ann.*, §49-5014). Following the decision in *Dunn, supra,* an additional restriction was added to the program in 1975 which was the basis for the remand and which provided,

"Colleges and universities enrolling tuition grant recipients and receiving tuition grant funds shall use those funds solely for secular purposes, and shall maintain such records as are necessary to allow certification that funds received through the tuition grant program are used for secular purposes." (*Tenn. Code Ann.* §49-5020).

In addition, at least three state Supreme Courts have held similar college tuition grant programs, available for use at sec-

tarian affiliated colleges, to violate federal constitutional First Amendment guarantees. In *Opinion of the Justices*, 291 Ala. 301, 306 (1973), 280 So.2d 547, 553, the unanimous Supreme Court of Alabama held that such a program "would therefore be unconstitutional under the Religious Clauses of the First Amendment to the Federal Constitution . . ."

In *State of Nebraska* ex rel. *Rogers* v. *Swanson*, etc., 192 Neb. 125 (1974), 219 N.W.2d 726, the Supreme Court of Nebraska invalidated a college tuition program, which like the Missouri program had the identical, singular restriction providing that "a student pursuing courses leading to a theological or divinity degree shall not be eligible to receive tuition grants." 192 Neb. at 140, 219 N.W.2d at 735. In referring to the federal questions raised, the Court stated,

> "There is no restriction in the act that the proceeds received through these grants be limited to secular subjects, so obviously in some institutions these tuition grants finance sectarian subjects. This alone shows secular and sectarian subjects are so intertwined in and supported by the tuition grants that L.B. 1171 violates the Establishment Clause." 192 Neb. at 140, 219 N.W.2d at 735.

A college tuition plan for orphans of war veterans was similarly held unconstitutional under the federal First Amendment by the Virginia Supreme Court in *Almond*, etc. v. *Day*, etc., 197 Va. 419, 428 (1955), 89 S.E.2d 851, 858.

Respondents below placed great reliance upon the three-pronged test of legislative purpose—primary effect—excessive entanglement; but these standards are not ritualistic in application.

> "It is well to emphasize, however, that the tests must not stitutional inquiry, but serve only as guidelines with which be viewed as setting the precise limits to the necessary con-

> to identify instances in which the objectives of the Establishment Clause have been impaired." *Meek*, et al. v. *Pittenger*, etc., et al., 421 U.S. 349, 358-359 (1975).

Respondents' reliance upon *Tilton*, *Bubb* and *Roemer*, *supra*, was inappropriate, inasmuch as those characteristics of impermissible sectarian control, as defined by each of the respective decisions, are present in this cause. *Tilton*, *supra*, noted that none of the four colleges there under review "requires its students to attend religious services." 403 U.S. at 686. In the present cause Evangel, Hannibal-LaGrange, St. Paul's and Southwest Baptist Colleges all require attendance at religious services and religious courses are required at Central Methodist, Columbia, Culver-Stockton, Evangel, Hannibal-LaGrange, Maryville, Notre Dame, Rockhurst, St. Louis University (Arts and Sciences), St. Mary's of O'Fallon, St. Paul's, The School of the Ozarks, Southwest Baptist, Tarkio and William Jewell Colleges.

In *Bubb*, *supra*, the court found no colleges which required attendance at religious services (379 F.Supp. at 884-885), as in *Tilton*, *supra*, but did find and excluded those colleges that might test students in "(t)opic related to Christian faith." 379 F.Supp. at 892. Many of the instant colleges are within these prohibitive purviews and the same are immediately hereinabove set forth *re Tilton*, *supra*. A third exclusion by the *Bubb* Court was any college which "reserves the right to give preference on enrollments" to members of supporting church congregations. 379 F. Supp. at 892. Such preferences by way of admissions and/or scholarship aid exists expressly at Central Methodist, Culver-Stockton, Evangel, Hannibal-LaGrange, Notre Dame, St. Paul's and Southwest Baptist Colleges.

Characteristics found objectionable in *Roemer*, *supra*, included "require(d) attendance at any religious exercise" (see discussion above regarding *Tilton*, *supra*), and "receive(s) aid from or make(s) reports to an institutional church." 387 F.

Supp. at 1295. The following colleges fall within the latter proscription: Avila, Central Methodist, Columbia, Culver-Stockton, Evangel, Fontbonne, Hannibal-LaGrange, Notre Dame, Rockhurst, St. Louis University (Arts and Sciences), St. Paul's, The School of the Ozarks, Southwest Baptist, Tarkio and William Jewell.

Respondents' reliance below upon *Hunt* v. *McNair*, etc., et al., 413 U.S. 734 (1973), in light of the connections between the colleges and the Baptist Convention is also inappropriate. *Hunt*, *supra*, was not decided upon the sectarian characteristics of the recipient colleges, but rather upon the nature of the challenged state assistance. State Supreme Courts have similarly upheld identical bond issuance programs to aid higher education. See: *Durham*, et al. v. *McLeod*, etc., et al., 259 S.C. 409 (1972), 192 S.E.2d 202; and *Minnesota Higher Education Facilities Authority v. Hawk*, etc., — Minn. — (1975), 232 N.W.2d 106. While this Honorable Court did determine that "there is no basis to conclude that the College's operations are oriented significantly towards sectarian rather than secular education." 413 U.S. at 744; in the preceding and introductory sentence stated, this Honorable Court stated,

> "What little there is in the record concerning the College establishes that there are no religious qualifications for faculty membership or student admission, and that only 60% of the College student body is Baptist, a percentage roughly equivalent to the percentage of Baptists in that area of South Carolina." 413 U.S. at 743-744.

While religious qualifications for student admission has been explored hereinabove, the following colleges, among others, impose religious qualifications upon faculty: Evangel, Hannibal-LaGrange and St. Paul's; and, the following colleges, among others, have student bodies grossly disproportionate to the population on the basis of religion: Evangel, Fontbonne, Notre-Dame, St. Louis University (Arts and Sciences), St. Paul's and

William Jewell. (Stip. ¶ 48) (Tr. 122-123) (Ros.Depo. at 57-58).

The Maryland legislation in *Roemer*, *supra*, specifically, although belatedly, provided that,

> " 'None of the moneys payable under this subtitle shall be utilized by the institutions for sectarian purposes.' " 96 S.Ct. at 2342, 49 L.Ed.2d at 184.

The Tennessee Legislature in *Dunn*, *supra*, also specifically, although belatedly, provided that,

> "Colleges and universities enrolling tuition grant recipients and receiving tuition grant funds shall use those funds solely for secular purposes, and shall maintain such records as are necessary to allow certification that funds received through the tuition grant program are used for secular purposes." *Tenn.CodeAnn.* §49-5020.

No such restrictions appear in the Missouri statutory program, herein challenged.

Never has this Honorable Court nor has any state Supreme Court approved a flow of funds, directly or indirectly, to sectarian-related colleges, without an express statutory restriction against their sectarian use. Federal and state cases to the contrary are legion.

The statutory scheme herein challenged is unquestionably unconstitutional on its face. The mere proscription against recipients engaged in programs "leading to a degree in theology or divinity" (*Mo.Rev.Stat.* § 173.215[1][6]), does not begin to approach the total prohibitions against use of funds for any sectarian purposes upheld in *Tilton* and *Roemer*, *supra*, and relied upon by respondents or the standards of *Lemon*, *supra*, *etc*. Further, the specific prohibition against "a degree in theology or divinity" has been repeatedly held constitutionally

inadequate on each occasion the same has been challenged. See: *Hartness* v. *Patterson*, etc., et al., 255 S.C. 503 (1971), 179 S.E.2d 907; *Weiss*, et al. v. *O'Brien*, etc., et al., 82 Wash. 2d 199 (1973), 509 P.2d 973; *State of Nebraska* ex rel. *Rogers* v. *Swanson*, etc., 192 Neb. 125 (1974), 219 N.W. 2d 726; and *Dunn, supra.*

All of the 17 tainted colleges possess, among others, one or more of the following sectarian characteristics: Religious qualifications for the Board of Trustees (13 colleges); Stated sectarian goals, aims, purposes, etc. (13 colleges); Religious holidays as college holidays, although not commonly accepted as school holidays, *e.g.*, "Good Friday" (five colleges); Direct financial support received from supporting churches and/or religious societies (15 colleges); Disproportionate exposure through course offerings of the college's affiliated denominational beliefs (15 colleges); Required attendance at religious services (four colleges); The regular holding of one particular denomination's religious services on campus (12 colleges, Requirement of religious courses (15 colleges); Religious preferences in regard to president (eight colleges), administrators (two colleges), faculty (four colleges) and students (seven colleges); Awards of scholarships on the basis of religion (seven colleges); Church ownership of the college (four colleges); Prayers in the classroom (two colleges); and, Religious symbolism on campus buildings and in classrooms (nine colleges). Not one of these characteristics would be constitutionally permissible at a public college of this state.

V. Constitutional Violations in the Statutes' Application

The statutory requirements imposed by law have not been complied with by the administrating Coordinating Board for Higher Education.

Section 173.205 states in part,

> "(2) '*Approved private institution,*' a nonprofit institution, dedicated to educational purposes, located in Missouri, which:
>
> . . .
>
> (d) does not discriminate in the hiring of administrators, faculty and staff or in the admission of students on the basis of race, color, religion, sex, or national origin and is otherwise in compliance with the Federal Civil Rights Acts of 1965 and 1968 and executive orders issued pursuant thereto;"

This statutory requirement is being openly violated in practice, both as to sex and as to religious discrimination.

A. Sexual Discrimination

The following approved colleges admit only women students: Cottey College (Cat. at 5); Lindenwood College for Women (Cat. at 1); Stephens College (Cat. at 3); and William Woods College (Cat. at 11). The following approved colleges admit only men students: Kemper Military School and College (Cat. at 5); Wentworth Military Academy (Cat. at 5); and Westminster College (Cat. at 3). (See: Stip. ¶12; R. 112-113).

These violations have been permitted by the respondents on the premise that such practice "would not be considered discriminating since it was traditional, since it was historical." (Deposition of Hugh Voss, Director of Student Aid Program, Missouri Department of Higher Education [Voss Depo.] at pages 65-66).

This occurs despite the fact that the statutory prohibition against discrimination is considered by the commission to be

a standard of compliance, *independent of and additional to* the standards of compliance with the Federal Civil Rights Acts of 1964 and 1968 and Executive Orders issued pursuant thereto. (Voss Depo. at 19). It is clear that the use of the conjunctive "and" in § 173.205(2)(d) was to provide that federal provisions against discrimination were to be cumulative and not alternative to the specific self-contained statutory provisions against discrimination which precedes it. The Board has chosen to "grandfather" certain institutions, without the assistance of statutory approval; and in a manner which raises serious equal protection problems for students desiring to attend newly organized non-coeducational colleges, which otherwise would meet the standards of an approved private institution.

B. **Religious Discrimination**

The following approved colleges discriminate on the basis of religion for all administrators: Evangel College and Hannibal-LaGrange College. (Stip. ¶ 33, 34) (R. 119). The following approved colleges discriminate on the basis of religion in the hiring of the President of the college: Fontbonne College; Notre Dame College; Rockhurst College; St. Louis University; Southwest Baptist College: and St. Paul's College. (Stip. ¶ 35, 36, 37, 38, 39) (R. 120).

This practice has been allowed by the administrating Board on the premise that "the president of a college" is not interpreted to be a member of the college administration. (Voss Depo. at 51). This is contrary to the statements of the two college presidents of approved institutions, who testified in their respective depositions that they consider themselves part of the administration. (See: Coll.Depo. at 149-151; and Ros.Depo. at 41).

Respondents have chosen to ignore the obvious attempt by *Mo.Rev.Stat.*, § 173.205(2)(d) at total inclusiveness of the col-

lege commnuity by referring to "administrators, faculty . . . staff . . . students" by definitionally creating a totally new class of college personnel, that of "executive". Respondents attempt this guise without benefit of fact or laws.

As regards respondents' exclusion of "President" as a college administrator, the requirement for "approved" eligibility includes the execution by each college of a form entitled "Certification of Institutional Eligibility" by the "Signature of Chief Administrative Officer" (Deposition of Jack L. Cross [Cross Depo.], Plaintiffs' Exhibit 2, Vol. II). Of those approved colleges which discriminate by religion in the hiring for the office of President (Fontbonne, Notre Dame, Rockhurst, St. Louis University [College of Arts and Sciences], Southwest Baptist and St. Paul's College [Stip. ¶ 35-39] [R. 120]), each and every college's "Certification" was executed by its respective President as the "Signature of Chief Administrative Officer." *Ibid.* Evangel and Hannibal-LaGrange Colleges, which discriminate by religion in the hiring of all administrators (Stip. ¶ 33, 34) (R. 119), executed their "Certification" by their President and Chairman of the Administrative Committee, respectively. (Cross Depo., Plts.Ex. 2, Vol. II). This specific form of religious discrimination admitted by respondents is merely cumulative to the numerous other forms of religious discrimination perpetuated by many of the approved colleges as to administrators, faculty and students, discussed above in greater detail.

By these subterfuges, respondents attempt constitutionally to cleanse the many colleges which openly and admittedly discriminate by reason of religion and/or sex in the hiring of the college's president or in the admission of students.

What emerges is a clear attempt by the respondents not to exclude colleges from participation in the program, despite the clear interdictions of the Act.

C. **North Central Accreditation**

Even the requirement of meeting "the standards for accreditation as determined by the North Central Association of Colleges and Secondary Schools" (Section 173.205[2][c]) has been weakened in interpretation and application by the administrating Board. It has been interpreted to include institutions which meet the "candidacy status" for accreditation by North Central, although not meeting the standards for accreditation themselves. (Voss Depo. at 43).

VI. The First Amendment and the Missouri Supreme Court Opinion

The Missouri Supreme Court in its opinion held the challenged legislation to comport with First Amendment requirements by looking exclusively to the tripartite test of secular purpose, primary effect and entanglement. 538 S.W.2d at 716-718. The decision ignored completely petitioners' primary argument as to the lack of sectarian restrictions upon use of the funds. See parts I and IV of Argument, *supra*.

The legislative failure to comply with constitutional requirements occurred through specific design and not through accident or oversight. Specific amendments to this challenged legislation qualifying an approved institution to be one that,

> "(f) Does not permit any church authority to determine educational practices or the composition of the board of control;" *Journal of the Missouri Senate*, Thirty-third Day —Tuesday, February 29, 1972 at p. 480.

or

> "(g) Does not require mandatory attendance by its students at any chapel service or other religious service, and does not require any course in religion." *Ibid.*

or

> "Does not assist any religious creed, church or sectarian purpose and is not controlled by any religious creed, church or sectarian denomination whatever." *Journal of the Missouri House*, April 30, 1972 (filed with Clerk but not reprinted in the Journal.

all failed in passage.

Under the challenged provision, the money goes directly to students and there is no requirement that such funds even be utilized for college education. There are no restrictions against such funds being used for unconstitutional purposes (such as a direct donation to the student's church) or for illegal purposes (such as gambling by the student).

If such funds are truly to benefit the student and not the college, why has their use been restricted at colleges located within the State of Missouri and why are Missouri residents precluded from using such funds for expenses incurred at out-of-state institutions. *Mo.Rev.Stat.* § 173.205(2). In addition, grant awards vary in amounts dependent not upon a comparison of actual financial need among various students; but instead are based upon the tuition and expenses of the various colleges themselves. Students attending more expensive schools receive more aid, even though their degree of financial need may be less than that of students attending less expensive colleges. In practice, the private college grants are larger on a per grant basis. This disparity ranges from an annual grant of $40.00 to a recipient attending Three Rivers Junior College in Poplar Bluffs to an annual grant of $900.00 to a student attending St. Louis University (College of Arts and Sciences) in St. Louis. In fact, only 22% of the funds during the 1974-75 academic year went to public school recipients, while 78% of

the funds went to private school recipients. The average public school award was $139.09, while the average private school award was $630.60, some 450% as much. (Stip. Ex. 2) (R. 131).

Lastly, the challenged statutes have inextricably entangled the colleges in their application. The colleges must certify the student's enrollment and attendance, after which the funds are transferred by the college to the student who may then use them in any manner the student desires and must report changes in the students' financial situations to the state. If the student subsequently withdraws from the college and the college under its contractual relationship with the student owes the student a partial refund of costs, this refund must be made directly to the state and not to the student to whom it is due. *Mo.Rev. Stat.* § 173.230.

CONCLUSION

It cannot seriously be denied that the present statutory scheme of tuition grants, herein challenged, allows the use of funds to flow to sectarian-affiliated colleges without any restriction as to their use upon receipt. This is clearly and has been held repeatedly to be constitutionally impermissible. For the decision of the Missouri Supreme Court to stand is the opening of the floodgates of unlimited public aid to sectarian institutions for denominational usage, merely by routing such funds through the institution's students without restriction upon their ultimate use. As this Honorable Court so aptly stated,

> "(C)onstitutional rights . . . can neither be nullified openly and directly by state legislatures or state executive or judicial officers, nor nullified indirectly by them through evasive schemes . . . whether attempted 'ingeniously or ingenuously'." *Cooper*, et al. v. *Aaron*, et al., 358 U.S. 1, 17 (1958).

Accordingly, petitioners respectfully pray that this Honorable Court grant petitioners' petition for a Writ of Certiorari to the

Supreme Court of Missouri and accept plenary review of the judgment and opinion of the Missouri Supreme Court.

Respectfully submitted,

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Certificate of Service

I, the undersigned attorney for Petitioners and a member of the bar of the United States Supreme Court, do hereby certify that pursuant to Supreme Court Rule No. 33, I have caused to be served true, correct and sufficient copies of the foregoing "Petition for a Writ of Certiorari", upon each party required to be so served, by depositing said copies in a United States Postal Service mail box, with first class postage prepaid and affixed, addressed to Mr. J. Paul Allred, Assistant Attorney General, Supreme Court Building, Jefferson City, Missouri 65101, Attorney for Respondents, and to Mr. Robert H. McRoberts, Sr., Bryan, Cave, McPheeters and McRoberts, 500 North Broadway, St. Louis, Missouri 63102, Attorneys for Intervenors-Respondents.

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APPENDIX

In the Circuit Court of the County of St. Louis
State of Missouri

American United, a Corporation, Missouri Friends of Public Schools, a Membership Association, G. Hugh Wamble and A. L. Palmer, Plaintiffs, vs. H. Lang Rogers, F. William McCalpin, Eugene Strauss, Joe T. Buerkle, Richard Blanck, Virginia Young, Lela Hackney Bell, Earl G. Harris and John Biggs, Constituent Members of the Coordinating Board for Higher Education of the State of Missouri, Defendants.	Cause No. 357577 Division No. Eight

JUDGMENT AND ORDER

This Court, having carefully considered and reviewed all relevant pleadings, depositions and exhibits thereto, the current approved schools' catalogs, the interrogatories and answers thereto, the Stipulation herein filed and its exhibits, the exemplary briefs and reply briefs filed by the parties and the able oral arguments of all counsel, it is hereby Ordered, Adjudged and Decreed:

1. The statutory scheme contained in Missouri Revised Statutes, Sections 173.200 to 173.235, popularly known as "The Financial Assistance Program" and providing for tuition grants to college students at certain approved public and private col-

leges, is hereby declared to be unconstitutional and void under the guarantees and rights provided within the First Amendment of the United States Constitution and provided within Article I, Sections 6 and 7, Article III, Section 8(a), Article IX, Section 8, and Article X, Section 3, all of the Missouri Constitution (1945).

2. Defendants are hereby enjoined and restrained from the disbursement or payment of any funds or tuition grants to students for use after June 30, 1976. Defendants specifically hereby are not enjoined nor restrained from the present administration and implementation of said statutes in preparation for future disbursements or payments of such funds, in the event of this Court's modification of this Judgment and Order or in the event of modification of this Judgment and Order by a higher Court upon appeal. Cost taxed against the defendants.

/s/ ROBERT G. J. HOESTER
The Honorable Robert G. J. Hoester,
Judge

Supreme Court, U. S.
FILED
OCT 27 1976
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-551

AMERICANS UNITED, a Corporation, MISSOURI FRIENDS OF PUBLIC SCHOOLS, a Membership Association, G. HUGH WAMBLE and A. L. PALMER,
Petitioners,

vs.

H. LANG ROGERS, F. WILLIAM McCALPIN, EUGENE STRAUSS, JOE T. BUERKLE, RICHARD BLANCK, VIRGINIA YOUNG, LELA HACKNEY BELL, EARL G. HARRIS and JOHN BIGGS, Constituent Members of the Coordinating Board for Higher Education of the State of Missouri,
Respondents,

and

INDEPENDENT COLLEGES & UNIVERSITIES OF MISSOURI, INC.,
Intervenor-Respondents.

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

To the Supreme Court of Missouri

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MORGAN, J. P., Judge.

On January 26, 1976, the trial court entered a judgment declaring that: "The statutory scheme contained in Missouri Revised Statutes, Sections 173.200 to 173.235, popularly known as 'The Financial Assistance Program' and providing for tuition grants to college students at certain approved public and private colleges, is hereby declared to be unconstitutional and void under the guarantees and rights provided within the First Amendment of the United States Constitution and provided within Article I, Sections 6 and 7, Article III, Section 38(a), Article IX, Section 8, and Article X, Section 3, all of the Missouri Constitution (1945)." The state Coordinating Board for Higher Education and certain Independent Colleges and Universities, defendants, have appealed. Jurisdiction of the cause is vested in this court by virtue of Article V, § 3, of the constitution of this state. We reverse.

The challenged statutory scheme was enacted by the General Assembly in 1972. During the 1975-76 school year, approximately 10,000 college students received financial assistance while enrolled in 57 different institutions in Missouri — 26 public and 31 private — approved by the Coordinating Board for Higher Education. The latter in § 173.210 is designated as the administrative agency for implementation of the program and is empowered to promulgate reasonable rules and regulations to effectuate the same. The

Board has the sole authority to "... select qualified recipients to receive financial assistance, make such awards of financial assistance to qualified recipients and determine the manner and method of payment to the recipient."

§ 173.200 is entitled "Purpose of sections 173.200 to 173.235" and reads: "The general assembly, giving due consideration to the historical and continuing interest of the people of the state of Missouri in encouraging deserving and qualified youths to realize their aspirations for higher education, finds and declares that higher education for residents of this state who desire such an education and are properly qualified therefor, is important to the welfare and security of this state and the nation, and consequently is an important public purpose. The general assembly finds and declares that the state can achieve its full economic and social potential only if every individual has the opportunity to contribute to the full extent of his capabilities and only when financial barriers to his economic, social and educational goals are removed. It is therefore, the policy of the general assembly and the purpose of sections 173.200 to 173.235 to establish a financial assistance program to enable qualified full-time students to receive nonreligious educational services in a public or private institution of higher education of their choice."

§ 173.205 contains definitions of academic year, approved private institution, approved

public institution, coordinating board, financial assistance, financial need and full-time student. Two, therein, are of immediate and special interest:

"(2) 'Approved private institution', a non-profit institution, dedicated to educational purposes, located in Missouri which: (a) Is operated privately under the control of an independent board and not directly controlled or administered by any public agency or political subdivision; (b) Provides at least a collegiate level course of instruction for a minimum of two years, leading or directly creditable toward an associate or baccalaureate degree; (c) Meets the standards for accreditation as determined by the North Central Association of Colleges and Secondary Schools; (d) Does not discriminate in the hiring of administrators, faculty and staff or in the admission of students on the basis of race, color, religion, sex, or national origin and is in compliance with the Federal Civil Rights Acts of 1964 and 1968 [42 U.S.C.A. §§ 2000a et seq., 3601 et seq.] and executive orders issued pursuant thereto; (e) Permits faculty members to select textbooks without influence or pressure by any source; * * * and (6) 'Financial need', the difference between the financial resources available to an applicant as determined by the coordinating board, and the applicant's anticipated expenses, including tuition, mandatory fees, and board and room while attending an approved private or public institution of higher education. In determining need the coordinating

board shall employ a formula similar to nationally recognized comprehensive mechanisms for determining need, such as those of the American College Testing Program or the College Scholarship Service; . . ."

§ 173.215 lists the basic qualifications of an applicant and, in part, provides: "1. An applicant shall be eligible for initial or renewed financial assistance only if, at the time of his application and throughout the period during which he is receiving such assistance, he (1) Is a citizen of the United States; (2) Is a resident of the state of Missouri, as determined by reference to standards promulgated pursuant to section 173.140 [student loan program]; (3) Is enrolled, or has been accepted for enrollment as a full-time undergraduate student in an approved private or public institution; (4) Establishes that he has financial need; (5) Has never been convicted in any court of an offense which involved the use of force, disruption or seizure of property under the control of any institution of higher education to prevent officials or students in such institutions from engaging in their duties or pursuing their studies; and (6) No award shall be made under sections 173.200 to 173.235 to any applicant who is enrolled, or who intends to use the award to enroll, in a course of study leading to a degree in theology or divinity."

§ 173.220 limits the amount of any grant or award to the least of (1) applicant's financial need, (2) one-half the tuition and

mandatory fee charged at the institution attended or (3) the sum of Nine Hundred Dollars.

§ 173.230, in part, provides that "A recipient of financial assistance may transfer from one approved public or private institution to another without losing his eligibility for assistance ..."

By stipulation, the parties have agreed as to the manner in which awards are distributed, to-wit: "Payment of the award is made by individual check in the amount of the award payable solely to the student. The Department [Board] sends the checks for all of the students attending each institution to the financial aid officer at the particular institution for distribution to the students, which, generally speaking, occurs as follows: Each student is notified that his check is available at the cashier's window and present the necessary identification to claim the check. The student is expected by the institution to take care of any and all educational expenses such as tuition, fees, and room and board (where applicable) that might be owed to the institution at the time he receives the check. If the amount of the student's indebtedness to the institution equals or exceeds the amount of the check, the student normally endorses the check over to the institution and receives a receipt for having made such payment. If the amount of the check exceeds the student's indebtedness, the student normally endorses the check over to the institution and receives back cash or the institution's check for the

difference between his indebtedness and the amount of the check. If all of the charges of the institution for tuition, fees, and room and board (where applicable) have been paid from other sources, the check is turned over to the student to be used by him as he may see fit. The payment of a student's obligations to the institution is a matter to be worked out between the student and the institution."

It seems agreed that forty of the fifty-seven institutions recipients now attend have no church affiliation whatever.

The judgment entered by the trial court reflects that it was predicated upon the following constitutional provisions.

United States Constitution, First Amendment (in part): Congress shall make no law respecting an establishment of religion ...

Missouri Constitution:

Article I, § 6 - That no person can be compelled to erect, support or attend any place or system of worship, or to maintain or support any priest, minister, preacher or teacher of any sect, church, creed or denomination of religion; but if any person shall voluntarily make a contract for any such object, he shall be held to the performance of the same.

Article I, § 7 - That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship.

Article III, § 38(a) - The general assembly shall have no power to grant public money or property, or lend or authorize the lending of public credit, to any private person, association or corporation, excepting aid in public calamity, and general laws providing for pensions for the blind, for old age assistance, for aid to dependent or crippled children or the blind, for direct relief, for adjusted compensation, bonus or rehabilitation for discharged members of the armed services of the United States who were bona fide residents of this state during their service, and for the rehabilitation of other persons. Money or property may also be received from the United States and be redistributed together with public money of this state for any public purposes designated by the United States.

Article IX, § 8 - Neither the general assembly, nor any county, city, town, township, school district or other municipal corporation, shall ever make an

appropriation or pay from any public fund whatever, anything in aid of any religious creed, church or sectarian purpose, or to help to support or sustain any private or public school, academy, seminary, college, university, or other institution of learning controlled by any religious creed, church or sectarian denomination whatever, nor shall any grant or donation of personal property or real estate ever be made by the state, or any county, city, town, or other municipal corporation, for any religious creed, church, or sectarian purpose whatever.

Article X, § 3 - Taxes may be levied and collected for public purposes only, and shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax. All taxes shall be levied and collected by general laws and shall be payable during the fiscal or calendar year in which the property is assessed. Except as otherwise provided in this constitution, the methods of determining the value of property for taxation shall be fixed by law.

As we approach our task, we express appreciation for the assistance of excellent briefs submitted by the parties, the Attorney General and Amici Curiae. To sustain their respective positions, each has presented every conceivable argument with a comprehensive review of what are identified as supportive precedents. Within the limitations

of an opinion of reasonable length, an effort will be made to recognize all of the same.

When considering an attack on the constitutionality of a legislative enactment, we are guided by the established principle that: "The state constitution, unlike the federal constitution, is not a grant of power, but as to legislative power, it is only a limitation; and, therefore, except for the restrictions imposed by the state constitution, the power of the state legislature is unlimited and practically absolute. Kansas City v. Fishman, 362 Mo. 352, 241 S.W.2d 377 (1951). An act of the legislature is presumed to be valid and will not be declared unconstitutional unless it clearly and undoubtedly contravenes some constitutional provision. State ex rel. Eagleton v. McQueen, 378 S.W.2d 449 (Mo. banc 1964). Legislative enactments should be recognized and enforced by the courts as embodying the will of the people unless they are plainly and palpably a violation of the fundamental law of the constitution. Borden Company v. Thomason, 353 S.W.2d 735 (Mo. banc 1962)." State ex rel. Farmers' Electric Cooperative, Inc. v. State Environmental Improvement Authority, 518 S.W.2d 68, 72 (Mo. banc 1975). See also State ex inf. Danforth v. Merrell, 530 S.W.2d 209, 213 (Mo. banc 1975); Hickey v. Board of Education of City of St. Louis, 256 S.W.2d 775 (Mo. 1953); and State ex rel. McClellan v. Godfrey, 519 S.W.2d 4 (Mo. banc 1975).

It is obvious that the trial court, as shown by the judgment entry heretofore quoted,

determined that the statutory scheme was "facially" unconstitutional under the proscriptions of both the federal and state constitutions, and we shall consider the same in that order.

Federal.

Any need to analyze the manner in which the parties have interpreted the many federal church-state cases has been made unnecessary by the recent decision of the United States Supreme Court in Roemer v. Board of Public Works of Maryland, ___U.S.___, (No. 74-730, decided June 21, 1976). Therein, such a review and analysis was made and the court upheld a statute of the state of Maryland which (as described in the syllabus thereof): "... authorizes the payment of state funds to any private institution of higher learning within the State that meets certain minimum criteria, and refrains from awarding 'only seminarian or theological degrees.' The aid is in the form of an annual fiscal year subsidy to qualifying colleges and universities, based upon the number of students, excluding those in seminarian or theological programs ... and ... requires that eligible institutions not use funds for sectarian purposes."

The court again approved and applied the three-pronged test found in Lemon v. Kurtzman, 403 U.S. 602 (1971) at 612-613, that state aid must have a (1) secular legislative purpose, (2) a primary effect other than the advancement of religion and (3) no

tendency to entangle the state excessively in church affairs, as conditioned by the ultimate refinement thereof found in Hunt v. McNair, 413 U.S. 734 (1973) at 743, that a constitutional violation may nevertheless be present "... when it [aid] flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in otherwise substantially secular setting." Other cases considered therein, upon which the instant parties in part rely, are: Everson v. Board of Education, 330 U.S. 1 (1947); Board of Education v. Allen, 392 U.S. 236 (1968); Walz v. Tax Commission, 397 U.S. 664 (1970); Lemon v. Kurtzman, 411 U.S. 192 (1973); Committee for Public Education & Religious Liberty v. Nyquist, 413 U.S. 756 (1973); Levitt v. Committee for Public Education, 413 U.S. 472 (1973); and Meek v. Pittenger, 421 U.S. 349 (1975).

The statute approved in the Roemer case called for noncategorical grants of state funds directly to private institutions (not primarily awarding theological or seminary degrees) subject only to the one restriction that such funds not be used for "sectarian purposes." As to the recurrent argument, which is present in the instant case, that state funds even though strictly and faithfully expended for admittedly secular purposes do free other funds of an institution for sectarian purposes, the court said, l.c. (pp. 8-9 - Slip Opinion): "The Court has not been blind to the fact that

in aiding a religious institution to perform a secular task, the State frees the institution's resources to be put to sectarian ends. (Citing Hunt v. McNair, supra, at 743). If this were impermissible, however, a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair. The Court never has held that religious activities must be discriminated against in this way." Of particular interest is the court's recognition, again, of the differences between college and precollege educational processes, l.c. 12 (Slip Opinion), that: "... college students are less susceptible to religious indoctrination; college courses tend to entail an internal discipline that inherently limits the opportunities for sectarian influence; and a high degree of academic freedom tends to prevail at the college level." Perhaps most descriptive of the basic problem itself is found in the court's observation, l.c. 7 (Slip Opinion), that: "A system of government that makes itself felt as pervasively as ours could hardly be expected never to cross paths with the church. In fact, our State and Federal Governments impose certain burdens upon, and impart certain benefits to, virtually all our activities, and religious activity is not an exception. The Court has enforced a scrupulous neutrality by the State, as among religions, and also as between religious and other activities, but a hermetic separation of the two is an impossibility it has never required."

Under the guidelines noted, we seek to

resolve the federal question.

1. Does the statutory program have a secular purpose? We think the answer is "Yes." The "purpose" as declared by the General Assembly in § 173.200 need not be repeated other than to note it is bottomed upon an appreciation of the fact an educated citizenry contributes to the welfare of the state as well as its economic and social potential; and, thus assisting those having aspirations for higher education, but lack sufficient financial resources, necessarily is a public purpose. As said in Everson v. Board of Education, supra, at 7: "It is much too late to argue that legislation intended to facilitate the opportunity of children to get a secular education serves no public purpose." See also Pierce v. Society of Sisters, 268 U.S. 510 (1925) and Cochran v. Louisiana State Board of Education, 281 U.S. 370 (1930). No federal case suggesting otherwise has been called to our attention nor have we discovered any. While considering a comparable "declaration of purpose" in Hunt v. McNair, supra, the court said at 741: "The purpose of the statute is manifestly a secular one."

2. Is the primary effect of the statutory program other than the advancement of religion? We think the answer is "Yes." Hopefully, however, to avoid some repetition the reasons for our conclusion in this connection will await consideration of our state constitution, which not only proscribes "advancement

of religion" generally but other related activities specifically. Of special interest, however, is the court's statement in Hunt v. McNair, supra, at 742, that: "Whatever may be its initial appeal, the proposition that the Establishment Clause prohibits any program which in some manner aids an institution with religious affiliation has consistently been rejected."

3. Will implementation of the statutory program tend to entangle the state excessively in church affairs? We think the answer is "No." The statute approved in the Roemer case called for noncategorical grants to private schools to be used solely for secular purposes. At the end of each fiscal year, participating institutions had to file reports detailing each expenditure with a verification of its secular use. Under the statute now challenged, institutional involvement (with the state) is limited to verification that the student is actually in attendance at the particular school and repayment to the board of any refund due upon transfer or withdrawal of a student. The latter would appear to be less involved than the reporting under the statute of Maryland in the Roemer case. Nothing in the statutory program requires an institution to modify its rules and regulations or manner of providing college level teaching. Whether or not that mission is accomplished within the statutory "qualifications" is purely a statutory question and not one involving resolution of constitutional issues. "Excessive entanglement" does not arise necessarily

because the challenged plan calls for annual legislative appropriations and "political divisiveness" is diminished, if not eliminated, when student eligibility does not turn on whether or not a public or private institution is attended. Roemer case, supra, (pp. 25-27 - Slip Opinion).

The statutory program in question "facially" is not violative of the First Amendment to the United States Constitution.

State.

First, we consider the one point apparently not involving a church-state question stemming from Art. X, § 3, and Art. III, § 38(a). The former provision declares, in part, that "Taxes may be levied and collected for public purposes only ..." and the latter provides in so far as of interest here that: "The general assembly shall have no power to grant public money or property ... to any private person, association or corporation ..."

Does the statutory program have a public purpose? Generally the answer could only be "yes" and citation of authority is unnecessary, because Missouri has always given education the highest of priorities. As said in the Everson case reference the federal question, it is much too late to suggest otherwise. The present program is somewhat unique in that it involves education at the collegiate level — other than providing the basic facilities. It

is not a totally new question, however, as can be seen by reference to State ex rel. Garth v. Switzler, 45 S.W. 245 (Mo. banc 1898). Therein, the court disapproved of a "collateral succession tax" to endow free scholarship at the University of Missouri. It was rejected as an improper effort to legislate for a favored class solely to their own private use. Quoted with approval at 249 was a holding of the Supreme Court of Michigan in People v. Salem, 20 Mich. 452, that: "... the term 'public purpose,' as employed to denote objects for which taxes may be levied, has no relation to the urgency of the public need, or to the extent of the public benefit to follow." Proponents of the program challenge that such is the accepted present definition of "public purpose." It is of interest that the court recognized, l.c. 249, that what is and what is not a public purpose may turn on the course and usage of government and become sanctioned by time and acquiescence of the people. The court resolved that issue by declaring in 1898, l.c. 251, that: "Paternalism, whether state or federal, as the derivation of the term implies, is an assumption by the government of a quasi fatherly relation to the citizen and his family, involving excessive governmental regulation of the private affairs and business methods and interests of the people, upon the theory that the people are incapable of managing their own affairs, and is pernicious in its tendencies. In a word, it minimizes the citizen, and maximizes the government. Our federal and

state governments are founded upon a principle wholly antagonistic to such a doctrine. Our fathers believed the people of these free and independent states were capable of self-government, — a system in which the people are the sovereigns, and the government their creature, to carry out their commands. Such a government is founded on the willingness and the right of the people to take care of their own affairs, and an indisposition on their part to look to the government for everything. The citizen is the unit. It is his province to support the government, and not the government to support him. Under self-government, we have advanced in all the elements of a great people more rapidly than any nation that has ever existed upon the earth, and there is greater need now than ever before in our history of adhering to it. Paternalism is a plant that should receive no nourishment upon the soil of Missouri."

We doubt that a court in 1976 is free to accept and apply the very limited definition placed on "public purpose" in 1898 by the Switzler case. "Time" and "acquiescence" have made the same of historical interest only. Whether that change has been good or bad is not for this court to decide or comment upon. In any event, we are not inclined to drive the General Assembly back into the nineteenth century. "To be guided solely by whether a given activity had, at some previous time, been recognized as a public purpose would make the law static. Such a standard would compel us to retain

in the law, as appropriate for public expenditure, activities which have ceased to be of public concern; and would prevent us from adopting new public functions regardless of how essential to the public welfare they may have become by reason of changed conditions. Nor can we be governed alone by the fact that only a portion of the public will be directly benefited, or benefited in a greater degree than the public generally." Laret Inv. Co. v. Dickmann, 134 S.W.2d 65, 68 (Mo. banc 1939). See also Kansas City v. Liebi et al. (reported as In Re Kansas City Ordinance No. 39946), 252 S.W. 404 (Mo. banc 1923), and Bowman v. Kansas City, 233 S.W.2d 26 (Mo. banc 1950).

Higher secular education today is unquestionably considered to be a contributing factor toward the betterment of society, and we find nothing in the constitution of this state prohibiting the legislative department from declaring the encouragement thereof a "public purpose." Certainly under modern day concepts such action can not be called "arbitrary" or "unreasonable." State ex inf. Danforth ex rel. Farmers Electric Cooperative, Inc. v. State Environmental Improvement Authority, supra.

Does the manner selected by the General Assembly to accomplish the stated purpose do violence to Art. 3, § 38(a)? We are not convinced that it does. The presence of a legitimate "public purpose" makes society or the people of this state the direct beneficiary of

the expenditures. Certain recipients-students, as amici curiae, submit that they "... do not come before this Court to argue that there is no desirable private benefit inherent in the Act; indeed, they and thousands of their peers unquestionably benefit ... However, benefit is to be distinguished from purpose and incidental private benefit does not preclude a transcendant public purpose * * * it could be argued that private benefit to sufficient numbers of the citizenry creates a public purpose and that grants of public monies to 10,000 of Missouri's student-citizens may itself constitute a public purpose. Even disregarding that argument, the law is clear in Missouri that an overriding public purpose will not suffer constitutional death at the hands of incidental private benefit." Missouri cases cited throughout this opinion confirm that such is the law in this state. See also State v. Land Clearance For Redevelopment Auth., 270 S.W.2d 44, 52-53 (Mo. banc 1954); and Annbar Associates v. West Side Redevelopment Corp., 397 S.W.2d 635, 653 (Mo. banc 1966).

It is suggested by a very logical argument that resolution of this state issue disposes of the case, and that no church-state question is actually involved. The theory being that the grants made lose their identity as public funds when the students commingle the same with required other funds to obtain a college education, i.e., the "public purpose" is then served. However, in view of the breadth of the trial court's ruling we do not consider it

appropriate to act on the suggestion.

Second, we return to the so-called religious aspects of the case.

Challengers herein emphasize that the constitution of Missouri, as construed by this court, is more "restrictive" than the First Amendment to the United States Constitution in prohibiting expenditures of public funds in a manner tending to erode an absolute separation of church and state. Luetkemeyer et al. v. Kaufmann et al., 364 F. Supp. 376 (W. D. Mo. 1973), affirmed 419 U. S. 888 (1974). Comparable declarations, with the rationale thereof, may be found in Harfst v. Hoegen, 163 S. W. 2d 609 (Mo. banc 1942); Berghorn v. Reorganized School District No. 8, Franklin County, Missouri, 260 S. W. 2d 573 (Mo. 1953); and, more recently, in Paster v. Tussey, 512 S. W. 2d 97 (Mo. banc 1974), cert. den. 419 U. S. 1111 (1975). The validity of such holdings becomes apparent after even a cursory reading of those portions of the constitution of this state heretofore quoted.

Since we are here concerned with a college related program, Art. IX, § 8, is of particular interest, because it proscribes "an appropriation ... from any public fund ... to help support or sustain any private or public school, academy, seminary, college, university, or other institution of learning controlled by any religious creed, church or sectarian denomination whatever ..." Chal-

lengers of the plan submit that the section does not distinguish between various educational levels and thereby prohibits adoption of a different standard for schools of higher education from that applied to elementary-secondary schools. With this we agree. Nevertheless, there does remain a question as to whether or not the factual situation now presented is comparable to that found in the Harfst, Berghorn and Paster cases, supra. Proponents of the program submit that it is not and seek to distinguish the same. We quote a portion of the argument made, to-wit: "... the Missouri Financial Assistance Program deals with aid to needy students seeking higher education * * * The Program provides assistance to adults whose parents no longer have any legal obligation to provide them with an education, rather than to immature children who are fully dependent on their parents for financial, educational and spiritual guidance and support * * * The language of the Act is clear and explicit in providing that the Program is designed and implemented for the benefit of the students, not of the institutions, and that the awards are made to the students, not to the institutions * * * The legislative purpose in no wise includes supporting aiding or sustaining either public or private educational institutions * * * Permeating the Act is the concept that awards made pursuant to the Program are to be made only to a 'qualified applicant,' i.e., a 'student', an 'individual' enrolled in an approved public or private institution ... based on 'his' financial need,

not on the need of the public or private institution which the student elects to attend." The argument is not without some merit, because it is a matter of common knowledge that there is a factual distinction between the availability of educational opportunities at the college level and that at the elementary-secondary. The latter is provided and supported by tax monies free to all who attend; and, as was concluded in the Paster case, expenditures for those who reject the free education offered in the public schools and attend a private school (for reasons of their own) are constitutionally prohibited. As said therein, l.c. 105: "Although parents who send their children to private schools bear the burden of supporting such institutions, as well as the public schools, the additional burden is self-imposed. That such a sacrifice has been made by so many through the years makes it self-evident that individuals, as such, do act and live with a sectarian purpose in the area of education — an objective which the people of Missouri, speaking through their constitution, have protected fully but also have declared to be one personal to the individual."

In contrast, the state does not provide a free college education and we believe that attendance at other than public institutions at that level does not have the same religious implications or significance as was found in the Paster case. The constitutional restriction is only that the institution not be "... controlled by any religious creed, church or

sectarian denomination ..." and the statutory provisions in question appear to dictate as much. § 173.205(2)(a) requires that an "approved" school must have an "independent board." Thus, those schools statutorily qualified would not be subjected to that "control" prohibited by Article IX, § 8, of the Missouri Constitution. Furthermore, the qualifications include approval by accrediting groups which condition approval on academic freedom. 173.205(2)(c).

It is argued, additionally, by those defending the program that tuition and fee payments made by a student do not represent grants "in aid of" or "help to support or sustain" an institution. It is submitted that such payments: "... were not gifts or donations by the students to the institutions, but were the quid pro quo in return for which the institutions were contractually required to make available the opportunities for the students to obtain a college education * * * No institution made a 'profit' on the tuition fees received, whether paid in part by a recipient of an award from the Missouri program, from some Federal program, or by the student out of his own pocket. All qualified institutions are not-for-profit organizations, and the record shows that the cost to each institution of furnishing to its students their educational opportunities is always far greater than the amount of the tuition received." In essence, the argument presents the practical suggestion that upon the enrollment of a student the selected institution, be it public or private, must find

additional funds (over and above the tuition or mandatory fee), and that it is at least debatable whether or not encouraging the creation of such additional obligations is constitutionally proscribed for the reason it is in "aid" of an institution. Reference is made to Kintzele v. City of St. Louis, 347 S.W.2d 695 (Mo. banc 1961), involving sale of land by the St. Louis Land Clearance for Redevelopment Authority to St. Louis University, wherein this court approved with the view the sale was an "exchange of considerations" and thus not aid to a religious corporation.

In answer to the second part of the federal test (heretofore reserved), we are convinced that the statutory program does have a primary effect other than the advancement of religion.

Furthermore, we can not with confidence declare that the statutory program "clearly and undoubtedly contravenes" the Constitution of Missouri (State ex rel. Eagleton v. McQueen, supra); that it is "plainly and palpably a violation of fundamental law" of this state (Borden Company v. Thomason, supra); nor that it unquestionably "run[s] afoul of some constitutional prohibition" (State ex rel. Farmers' Electric Cooperative, Inc. v. State Environmental Improvement Authority, supra). Such being true, the program should be recognized as embodying the will of the people and not constitutionally objectionable. Judicial deference is not indicative of the avoidance of a duty but to the contrary is

the performance thereof with an appreciation that judicial interference with the legislative process should occur only when there is an unavoidable and legally compelling reason to do so. "[I]t is our duty to resolve all doubts in favor of the validity of a legislative act ..." State ex rel. McClellan v. Godfrey, 519 S.W.2d 4, 8 (Mo. banc 1975). In doing so, we take solace in the fact that the parochial school cases with which this court has dealt in the past involved completely different types of educational entities than the colleges and universities herein involved. As suggested by the proponents: "Institutions of higher education are able to boast of academic freedom, institutional independence, objective instruction, lack of indoctrination, faculty autonomy, mature students and a diversity of religious background in faculty and students."

Challengers of the program have not contended that the legislative finding embodied in § 173.200 was induced by fraud, collusion or bad faith, but we should comment on the subtle suggestion that approval here will open the gates to further efforts to breach the constitutional "wall" between the state and the church. Although finding the "wall" is perplexing, it is not for the courts to shy so far from the same as to do a disservice to those whose interests fall on one side or the other. We have decided this case on its merits under long established rules of statutory construction and will be available when and if further questions arise.

Lastly, there is a procedural problem. The prayer of plaintiffs' petition sought only a finding that the statutes involved were "facially" unconstitutional, and the judgment of the trial court is so limited. However, much of the record before this court and most of the arguments revolve around answers to interrogatories, stipulations, corporate by-laws and school catalogs of the individual institutions presumably that this court might determine which, if any, of the schools do not meet the "qualifications" set out in the statute. We do not think it appropriate for an appellate court to do so in the first instance; although the attack is directed actually at only 17 of the 51 institutions and arguably just 4. Nor is remand called for because the trial court did act on the prayer presented. Administration of the Act by the Board will be a continuing process in light of changing conditions and an approaching new school year. Nothing done here will prohibit challenges that the Act is being implemented in an unconstitutional manner.

The judgment is reversed.

HOLMAN and FINCH, JJ., concur.

BARDGETT, J., concurs in separate concurring opinion filed.

SEILER, C.J., and HENLEY and DONNELLY, JJ., dissent in separate dissenting opinions filed.

BARDGETT, JOHN E., Judge
(Concurring)

In view of the dissent[1] of Seiler, C.J., I deem it advisable to briefly state my views on the major portion of that dissent.

Just about four weeks ago this court upheld the constitutionality of the Missouri Campaign Finance and Disclosure Law in Chamberlin et al. v. Missouri Elections Commission et al., ___S.W.2d___ (59505 Mo. banc 6/21/76). In that case this court, quoting from State ex rel. State Highway Commission v. Paul et al., 368 S.W.2d 419, 422 (Mo. banc 1963), held:

"It is a cardinal rule of statutory construction that where a statute is fairly susceptible of a construction in harmony with the Constitution it must be given that construction by the courts and, unless the statute is clearly repugnant to the organic law, its constitutionality must be upheld. City of Joplin v. Industrial Commission of Missouri, Mo., 329 S.W.2d 687, 692[6];

1. I refrain from commenting on the quotation appearing in the dissent of Seiler, C.J., from Everson v. Board of Education, 330 U.S. 1 (1946), because it is taken from the dissenting opinion of Jackson, J., and is not the law of that case and is not representative of the United States Supreme Court's disposition of the matter.

Brown v. Morris, 365 Mo. 946, 290 S.W. 2d 160, 167[8]; State on inf. Dalton v. Metropolitan St. Louis Sewer Dist., 365 Mo. 1, 275 S.W. 2d 225, 234[23]; State ex inf. McKittrick v. American Colony Ins. Co., 336 Mo. 406, 80 S.W. 2d 876, 882-883[5]; State ex rel. Barrett v. May, 290 Mo. 302, 235 S.W. 124, 126[3].

"Courts will not ordinarily pass on constitutional questions where the case presented may be properly decided without doing so. McIntosh v. Connecticut General Life Ins. Co., Mo., 366 S.W. 2d 409, 412[2]; City of St. Joseph v. Roller, Mo., 363 S.W. 2d 609, 612 [6]; Rider v. Julian, 365 Mo. 313, 282 S.W. 2d 484, 497[23]."

The court said that the two subsections under attack in Chamberlin were fairly susceptible of a construction that will obviate any need to reach and decide the Fourteenth Amendment question (equal protection) decided by the trial court. The court then construed the two subsections, which facially were in conflict, so as to cause the ambiguous or conflicting subsections to be applied equally and therefore constitutionally. In so doing this court brought the subsections within the constitutional requirement.

The legislature is deemed to be aware of the inhibitions imposed by the constitution and therefore if statutory language is susceptible to two constructions, one constitutional and the other unconstitutional, it should be construed in a manner consistent with the provisions of the constitution. City of Kirkwood v. Allen, 399 S.W. 2d 30 (Mo. banc 1966); The Vessel "Abby Dodge" v. United States, 223 U.S. 166, 175 (1912).

In the instant case there is no provision in the statute under attack which directs or authorizes the use by a school of the award money for sectarian religious purposes. To the contrary, it appears that the proscription against the use of such funds for a course of study leading to a degree of theology or divinity clearly evidences a legislative intent that the money not be used for sectarian religious purposes. The coordinating board for higher education is the administrative agency charged with implementation of the program established by sections 173.200-173.235 and is vested with the power to "promulgate reasonable rules and regulations for the exercise of its functions and the effectuation of the purposes of sections 173.200 to 173.235." Sec. 173.210, RSMo Supp. 1975. It is clear from the "purpose" section of the act (sec. 173.200) and the other provisions of the act that it was not the intent of the legislature to provide money for sectarian religious purposes.

Such a construction of the instant statute by this court comports with the rules of construction articulated and applied in Chamberlin, supra, and City of Kirkwood v. Allen, supra, and would be consistent with this court's duty to construe legislative enactments so as to uphold their constitutionality when possible

rather than to strike down a legislative act because of an alleged omission when the constitutions of the United States and Missouri fill in that alleged omission and provide the perimeter within which the law can constitutionally operate.

Under the act the coordinating board has the obligation to promulgate regulations so as to insure that the funds are not used for sectarian religious purposes in conformity with the provisions of the constitutions of the United States and the State of Missouri.

The foregoing is set forth because of the dissenting opinion of Seiler, C.J., although it is quite clear under the majority opinion of Morgan, J., that the coordinating board has the obligation to administer the act in a constitutional manner and therefore to take such steps as necessary to insure that the funds not be used for sectarian religious purposes.

SEILER, ROBERT E., Chief Justice (dissenting).

The majority opinion has it both ways: it finds no violation of Art. III, Sec. 38 (a), which forbids granting public money to any private person, saying that the statutory program has a public purpose and hence the people of the state are the direct beneficiaries of the expenditures. It finds no violation of Art. IX, Sec. 8, which prohibits use of public funds in aid of any religion or

sectarian purpose or to help sustain any college controlled by any church or sectarian denomination, on the basis that the aid is to the student, not the school. I do not see how the granting of $900 of public funds to a student can be treated as a grant to the people of the state so as to avoid being a grant to a private person and also at the same time be treated as a direct grant to the student so as to avoid being an appropriation in aid of any religious creed, church or sectarian purpose of a private college.

In addition, I believe the statute violates the Missouri constitutional provisions calling for strict separation of church and state, which are more explicit and restrictive than those of the First Amendment to the federal constitution. Paster v. Tussey, 512 S.W.2d 97 (Mo. banc 1974). The statutory scheme contains no limitation that the college where the student uses his grant to pay the tuition be not sectarian. There is nothing which insures that the public funds which are made available will not be used, either directly or indirectly, in aid of a denomination of religion or in aid of a sectarian purpose if that happens to be the type of college which the student selects. All the requirements of the present statute can be met and yet the public funds made available can be used for the forbidden purposes.

Our constitution forbids use of public funds in aid of any sectarian purpose or to support or sustain any college controlled by

any sectarian denomination whatever, Art. IX, Sec. 8. No public money shall, directly or indirectly, be put to aid any sect, Art. I, Sec. 7. "... The constitutional policy of our State has decreed the absolute separation of church and state, not only in governmental matters, but in educational ones as well. Public money, coming from taxpayers of every denomination, may not be used for the help of any religious sect in education or otherwise. ..." Harfst et al. v. Hoegen et al., 349 Mo. 808, 163 S.W.2d 609, 614 (banc 1942).

I do not believe the legislature can constitutionally adopt a statute authorizing the granting of public funds to private persons to use for tuition or other school purposes without at the same time incorporating in the statute safeguards against the funds being used, directly or indirectly, to support a sectarian institution. I do not believe the legislature can leave this unprovided for, as has been attempted here.

This is not what was done in Maryland, in its statute providing for grants to private colleges which was upheld in Roemer v. Board of Public Works of Maryland, ___U.S.___ (No. 74-730), decided June 21, 1976 and on which the majority opinion places heavy reliance. In the Maryland statute, it was expressly provided that "None of the moneys payable under this substitute shall be utilized by the institutions for sectarian purpose." The Maryland Council for Higher Education,

which is the counterpart of our Coordinating Board for Higher Education, requires that eligible institutions not put the funds to any sectarian use. The institution must affirmatively declare that the funds will not be used for sectarian purposes and must set forth the specific nonsectarian uses that are planned. At the end of the year the institution must confirm the nonsectarian use of the funds. It must keep the funds in a special account and must retain for verification by the Council sufficient documentation to verify that the funds were not used for sectarian purposes. In the statute which the Supreme Court held in the Roemer case did not violate the federal constitution, the Maryland legislature carefully, even meticulously, saw to it that state funds would not be used for sectarian purposes. There is a glaring absence of any such restrictions in the Missouri statute and that is why it is unconstitutional on its face: as presently drawn, it permits the use of public funds for sectarian purposes, either directly or indirectly.

The statute states its purpose is to enable qualified full-time students to receive nonreligious educational services in a public or private institution of higher education of their choice, Sec. 173.200. But a sectarian institution can and does provide nonreligious educational services, such as courses in mathematics, physics, languages, geography, music, history and the like. It does not follow that because a student receives nonreligious educational services that the college

where he receives them is not a sectarian institution.

The statute also requires that to be considered an "approved private institution", the college, among other things, must be operated "under the control of an independent board". Sec. 173.205 (2)(a). But this does not mean that the college is not sectarian. It might have a fiercely independent board which nevertheless is determined to and does operate a sectarian institution. In the case at bar, Southwest Baptist College and William Jewell College are examples of colleges whose boards of trustees have firm and independent convictions that their colleges are and will continue to be sectarian. These two institutions, on their own initiative, addressed communications in writing to the trial court, making it known that it was incorrect to refer to them as nonsectarian. Both sides in this case have addressed portions of their briefs to these declarations. Both colleges made it quite plain that they have a mission of Christian education in American higher education — that the Christian commitment is their dominant characteristic. The boards of these two colleges each consist of twenty-four trustees, selected by the Baptist Convention. There is no doubt that these boards are independent, in the sense of voting their own convictions and not being subordinate or subject to the control of others in the operation of the college, but it is equally clear that they are determined to operate a sectarian institution with a commitment to follow the Christian doctrine as seen

by the Baptists. It may not take, but in these two colleges, they are not leaving the student "to pick up religion by chance". There is nothing wrong about this, of course, but it cannot be supported or aided by public funds under our constitution, and yet so far as the statute is concerned these institutions are eligible for approval.

The statute prohibits any grant to a student who is enrolled in a course of study leading to a degree of theology or divinity. Sec. 173.215.1(6). This, however, provides no assurance that the college being helped is not sectarian. It could be sectarian and not offend this part of the statute so long as the student receiving aid to go to the college did not take a course of study leading to a degree in theology.

The statute also provides that an approved institution must meet the standards for accreditation as set by the North Central Association of Colleges and Secondary Schools, that it must operate in compliance with the Civil Rights Act of 1965 and not discriminate as to students, faculty, staff or administration on the basis of race, color, religion, sex or national origin, and must permit faculty members to select textbooks without influence or pressure from any source. Sec. 173.205(3) (d), (e), and (f). None of these mean that the school is free from sectarianism. It could be in full compliance with the foregoing requirements and still be sectarian in its teachings, character, atmosphere, and opera-

tion.

Without undertaking to set forth in lengthy detail the specific examples of sectarianism which are present in their operation as institutions of higher learning, the same goes for fifteen others of the private colleges before us, eight of which have an admittedly close relationship with various Protestant denominations and seven with the Catholic church.

The majority opinion says that if this is true, then the way to get at it is by challenging that the statute in being carried out in an unconstitutional fashion; that this is "purely a statutory question and not one involving resolution of constitutional issues." But this argument assumes that we have a statute which forbids use of the public funds for sectarian purposes, directly or indirectly. However, as pointed out, we do not. The Board could very well say it finds nothing in the state prohibiting use for sectarian purposes and that it is no part of its duty to make any such inquiries of the college or the student.

In sum, the tests or guides contained in the statute do not meet the real issue.

Finally, in my opinion, it is not even arguable that giving a grant to a student is not a form of public aid to the college. Beyond question, the student is going to use the grant to help pay his college expenses, including tuition. This, in effect, is what the statute

says is expected. Tuition is part of the lifeblood of a private college and anything that helps the student pay tuition helps the college to that extent and frees money for the college to use for other purposes. In the case before us, the student is merely the conduit of the grant through whom the state aid is transmitted to the school.

The majority opinion recognizes this indirect aid effect to the school, but quotes from the Roemer decision about its being permissible for a church to be protected by the police and fire departments or to have its public sidewalk kept in repair. But, respectfully submitted, this argument by analogy does not fit the present case. In the first place, the constitutional prohibitions against mingling of church and state containcd in the Missouri constitution are much stronger than those contained in the First Amendment, as we have often held, Paster v. Tussey, supra. Our constitution prohibits aid, either "directly or indirectly", Art. I, Sec. 7 (emphasis added). There is no such provision in the First Amendment.

Second, as Mr. Justice Jackson wrote in disposing of a similar argument in Everson v. Board of Education, 330 U.S. 1, 25-26:

"... A policeman protects a Catholic, of course — but not because he is a Catholic; it is because he is a man and a member of our society. The fireman protects the Church school — but not because it is a Church

school; it is because it is property, part of the assets of our society. Neither the fireman nor the policeman has to ask before he renders aid 'Is this man or building identified with the Catholic Church?' ... To consider the converse of the Court's reasoning will best disclose its fallacy. That there is no parallel between police and fire protection and this plan of reimbursement is apparent from the incongruity of the limitation of this Act if applied to police and fire service. Could we sustain an Act that said the police shall protect pupils on the way to or from public schools and Catholic schools but not while going to and coming from other schools, and firemen shall extinguish a blaze in public or Catholic school buildings but shall not put out a blaze in Protestant Church schools or private schools operated for profit? That is the true analogy to the case we have before us and I should think it pretty plain that such a scheme would not be valid."

The sidewalk in front of the church is kept in repair, or the fire extinguished, or the call for police protection answered, not because doing so is a form of aid to the church, but because doing so is in each instance a part of providing such protection for the community as a whole. It does not constitute any justification for arguing that indirect aid to sectarian schools by way of grant of public funds to needy students is thereby made constitutional.

In my opinion, Sec. 173.200-235 is unconstitutional on its face as violating Art. I, Sections 6 and 7 and Art. IX, Sec. 8 of the 1945 Constitution, and I therefore respectfully dissent. I would affirm the judgment of the trial court.

HENLEY, FRED L., Judge (dissenting)

Because the principal opinion approves an appropriation of money to assist young people in acquiring a college education, a worthy purpose with strong appeal to all of us, it would be easier to concur than to dissent and thereby hold the line drawn by the people in their constitution.

Section 38(a) of Article III, Constitution of Missouri, provides:

"The general assembly shall have no power to grant public money or property, or lend or authorize the lending of public credit, to any private person, association or corporation, excepting aid in public calamity, and general laws providing for pensions for the blind, for old age assistance, for aid to dependent or crippled children or the blind, for direct relief, for adjusted compensation, bonus or rehabilitation for discharged members of the armed services of the United States who were bona fide residents of this state during their service, and for the rehabilitation of other persons, * * *" (Emphasis added.)

Despite this command of the constitution,

the principal opinion has approved a grant of public money to private persons, needy college students. It does so on the basis that the money appropriated is for the use of these persons in acquiring a higher education, said to be a purpose which the general assembly may, in its legislative discretion, determine to be a "public" purpose. The answer to this is that the people have, by the "exception" clause in § 38(a), determined for themselves and specifically enumerated and limited the purposes for which the general assembly may grant public money to <u>private</u> persons.

It is not enough for the principal opinion to declare that aid to needy students is a "public purpose." In my opinion, a grant of public money to private persons may be made only for the "purposes" enumerated in the exception clause of § 38(a). A grant to private persons may not be made for any "purpose" other than those enumerated in the exception clause of § 38(a).

For the reasons stated, I respectfully dissent.

DONNELLY, ROBERT T., Judge (dissenting)

Article I, Section 7 of the Constitution of Missouri reads as follows:

> "That no money shall ever be taken from the public treasury, directly or <u>indirectly,</u> in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship." (Emphasis mine.)

I think it must be conceded that the money paid out under the challenged statutory scheme will result in aid to some denominations of religion. The statutory mode of payment of such money to students, rather than directly to institutions for sectarian purposes, is itself a classic example of <u>indirect</u> aid to denominations of religion.

The principal opinion quotes the provisions of Art. I, § 7, <u>supra</u>. They are not thereafter mentioned. The principal opinion thus ignores the <u>indirect</u> aid proscription in Art. I, § 7, <u>supra</u>, and applies to Missouri the less restrictive federal position on separation of church and state as articulated in <u>Roemer</u>.

In my opinion, the statutory scheme is facially unconstitutional because it authorizes violations of Art. I, § 7, <u>supra</u>.

I respectfully dissent.

Certificate of Service

I, the undersigned attorney for Petitioners and a member of the bar of the United States Supreme Court, do hereby certify that pursuant to Supreme Court Rule No. 33, I have caused to be served true, correct and sufficient copies of the foregoing "Supplemental Appendix to Petition for a Writ of Certiorari", upon each party required to be so served, by depositing said copies in a United States Postal Service mail box, with first class postage prepaid and affixed, addressed to Mr. J. Paul Allred, Assistant Attorney General, Supreme Court Building, Jefferson City, Missouri 65101, Attorney for Respondents, and to Mr. Robert H. McRoberts, Sr., Bryan, Cave, McPheeters and McRoberts, 500 North Broadway, St. Louis, Missouri 63102, Attorneys for Intervenors-Respondents.

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Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-551

AMERICANS UNITED, a Corporation, MISSOURI FRIENDS OF PUBLIC SCHOOLS, a Membership Association, G. HUGH WAMBLE and A. L. PALMER,
Petitioners,

v.

H. LANG ROGERS, F. WILLIAM McCALPIN, EUGENE STRAUSS, JOE T. BUERKLE, RICHARD BLANCK, VIRGINIA YOUNG, LELA HACKNEY BELL, EARL G. HARRIS and JOHN BIGGS, Constituent Members of the Coordinating Board for Higher Education of the State of Missouri,
Respondents,

and

INDEPENDENT COLLEGES & UNIVERSITIES OF MISSOURI, INC.,
Intervenor-Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Missouri

RESPONDENTS' JOINT BRIEF IN OPPOSITION

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Intervenor-Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Missouri

RESPONDENTS' JOINT BRIEF IN OPPOSITION

Respondents, members of the Coordinating Board for Higher Education of the State of Missouri, and Intervenor-Respondent, Independent Colleges and Universities of Missouri, Inc., jointly file this Brief in Opposition to the Petition for a Writ of Certiorari lodged in this Court on October 20, 1976.

INTRODUCTION

The prolix Petition submitted to this Court, consisting of 67 printed pages, represents a flagrant violation of Rule 23 of the Rules of this Court, which requires that the Petition contain "a concise statement of the case," and "a direct and concise argument amplifying the reasons relied on for the allowance of the writ." Petitioners have made no attempt whatever to comply with that Rule but instead have essentially reprinted their entire state-court brief on the merits, which contains numerous matters completely extraneous to the single federal question presented here. Rule 23(4) provides that:

> "The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying his petition."

Even in the days of less-crowded dockets, the Court has denied petitions of comparable length for violation of these guidelines. *Kennemar v. Billington*, 323 U.S. 709 (1944); *Zap v. United States*, 326 U.S. 777 (1945); *Tiger v. Lozier*, 275 U.S. 496 (1927); *Furness, Withy and Co., Ltd. v. Yang-Tsze Insurance Association, Ltd.*, 242 U.S. 430 (1917). Petitioners' callous disregard for the Rules and for this Court's caseload warrants denial of their Petition on that ground alone.

STATEMENT OF THE CASE

This litigation involves a constitutional attack on Sections 173.200 to 173.235 of the Missouri Statutes, which created the Missouri Financial Assistance Program for needy students of higher education in that State. The Program, adopted in 1972, is similar to the Federal Basic Educational Opportunity Grant Program created by 20 U.S.C. § 1070(a). Financial awards under the Missouri Program, including about 12% federal matching funds, are paid directly to the students, who may use them for the payment of tuition, room and board or fees at any approved *public* or *private* college in Missouri. The purpose of the Act, as stated in § 173.200, is to encourage "deserving and qualified youths to realize their aspirations for higher education" and "to enable qualified full-time students to receive *non-religious* educational services in a public or private institution of higher education of their choice."[1]

The statute stipulates that a recipient student must attend an "approved" public or private institution. Under the unique provisions of Section 173.205, as construed by the Missouri Supreme Court, a private institution can be "approved" only if it (1) is a non-profit organization controlled by a board which is independent of church or sectarian control; (2) permits faculty members to select textbooks without influence or pressure from any source; and (3) does not discriminate in the hiring of administrators, faculty or staff or in the admission of students on the basis, *inter alia*, of religion.[2] Section 173.215.1(6) provides that no award can be made to any applicant "who is enrolled, or who intends to use the award to enroll, in a course of study leading to a degree in theology or divinity."

The Program is administered by the Coordinating Board, which originally certified 31 private and 26 public institutions as "approved" within the meaning of the Statute.[3] During the 1974-75 academic year, more than 10,000 students received

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[1] Emphasis ours here and throughout this brief except where otherwise indicated.

[2] Similar requirements are imposed upon public colleges in order to attain "approved" status.

[3] Since the filing of the Missouri Supreme Court opinion, two private colleges (Evangel and St. Paul's) have been de-certified, and a third (Hannibal-LaGrange) has been suspended and ordered to show cause why its approval should not be withdrawn.

awards totaling approximately $3.8 million (including federal monies). Of these, 56.1% used their awards at public colleges and 43.9% at private colleges.

Petitioners initiated this action in state court primarily under the church-state provisions of the Missouri Constitution, which repeatedly have been characterized as far more restrictive than the First Amendment. *Luetkemeyer v. Kaufmann*, 364 F.Supp. 376 (W.D. Mo. 1973) *aff'd*, 419 U.S. 888 (1974); *Brusca v. State of Missouri ex rel. State Board of Education*, 332 F.Supp. 275 (E.D. Mo. 1971), *aff'd*, 405 U.S. 1050 (1972); *Paster v. Tussey*, 512 S.W.2d 97 (Mo. 1974) *cert. denied*, 419 U.S. 1111 (1975). The Missouri Supreme Court not only found the Act to be constitutional under the First Amendment, but also held that it did not run afoul of the considerably more stringent provisions of the state constitution.[4]

In its First Amendment analysis, the Court below relied heavily on this Court's recent opinion in *Roemer v. Board of Public Works of Maryland*, — U.S. —, 49 L.Ed.2d 179 (June 21, 1976), and applied the three-part test of that case as evolved from others such as *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Tilton v. Richardson*, 403 U.S. 672 (1971), and *Hunt v. McNair*, 413 U.S. 734 (1973). The Court held that the Missouri Act (1) has a secular purpose, (2) has a primary effect other than the advancement of religion, and (3) does not foster excessive entanglement. The secular purpose of the Act is readily discernible, *inter alia*, from the declaration of purpose inserted by the General Assembly in Section 173.200, and the Court noted that "an educated citizenry contributes to the welfare of the state as well as its economic and social potential." 538 S.W.2d at 717. The Court analyzed the following factors in determining that the advancement of religion was not the "pri-

[4] Although three judges dissented from this ultimate holding, none of the dissenters would have held the Act to be violative of the First Amendment.

mary effect" of the Act: (a) the funds are the property of the students and are payable to the students, who may use them to defray educational costs at the institution of their choice; (b) the majority of the students participating in the Program attend public, rather than private institutions, and only seventeen of thirty-one private institutions have any church relationship at all; (c) colleges and universities are "completely different types of educational entities" than parochial elementary and secondary schools involved in the cases relied on by petitioners; (d) there is no direct payment by the state to any college, and to the extent that the college does receive the money, it is not in the form of an unrestricted gift, but rather the college is required to supply a *quid pro quo* to the student in the form of an educational opportunity; and (e) the statutory requirements are adequate to prevent participation by a pervasively sectarian institution. 538 S.W.2d at 720-21.

Finally, the Missouri Supreme Court rejected the contention that the Act fosters excessive entanglement, noting that the involvement of the colleges with the state consists of nothing more than verification by the college of a student's enrollment. *Id.* at 718. Unquestionably, the Missouri Program creates considerably less entanglement than the Maryland plan approved in *Roemer*.

The Court observed that petitioners had sought only a declaration of "facial" invalidity and that they had resisted a college-by-college examination to determine whether the Act was being *applied* in an unconstitutional manner. The Court concluded, *l.c.* 718, that "the statutory program in question 'facially' is not violative of the First Amendment to the United States Constitution," and suggested that since the trial court had not undertaken to determine which, if any, of the challenged colleges should be declared ineligible for participation in the Program, "we do not think it appropriate for an appellate court to do so in the first instance." *Id.* at 722. Inasmuch as the Act was

facially valid, the Court suggested that the remaining questions of statutory interpretation and implementation should be first considered by the Coordinating Board.

Prior to filing their Petition in this Court, petitioners requested Mr. Justice Blackmun to stay application of the Statute pending Certiorari proceedings, but their Motion was denied on August 25, 1976 (No. A-160, O.T. 1976).

REASONS WHY THE WRIT SHOULD BE DENIED

Initially, it is apparent that none of the petitioners have legal standing to challenge the Missouri statute in this Court. Petitioner Americans United is a not-for-profit foreign corporation not even licensed to transact business in Missouri (Tr. 11).[5] Despite respondents' challenge to petitioners' standing (Tr. 14, 20), none of the petitioners offered even one shred of evidence that they have ever paid as much as one dollar in state or federal taxes. Therefore, what they are seeking to litigate here is "not a direct dollar-and-cents injury but is a religious difference" which does not create a "case or controversy" in the Article III sense. *Doremus v. Board of Education*, 342 U.S. 429, 434 (1952). See also *Flast v. Cohen*, 392 U.S. 83 (1968); *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974). Hence, irrespective of petitioners' standing in the state system, there is a fundamental jurisdictional defect in this Court. *Doremus, supra*, at 434.

Turning to the merits, it bears repeating that this case involves only a "facial" attack upon the Missouri Program. Nevertheless, petitioners have devoted 30 pages of their Petition to a distorted review of the operations of 17 approved Missouri colleges which they contend are "sectarian" in nature. We deem it inappropriate to engage in a detailed refutation of petitioners' slanted analysis of these colleges, especially in view of the single narrow issue presented. But we would hasten to point out that *no* court has held that any of these institutions is "sectarian" in nature or "permeated by a religious atmosphere," and in any event the record will not support any such finding. Petitioners

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[5] In *Roemer v. Board of Public Works of Maryland*, 387 F.Supp. 1282 (D. Md. 1974), *aff'd on other grounds*, — U.S. —, 49 L.Ed.2d 179 (June 21, 1976), Americans United was held to be without standing to raise similar issues in its home state of Maryland.

apparently intend to ask this Court to make that finding in the first instance.[6]

The Petition also seeks to create the impression that the vast majority of the colleges attended by recipients under the Program are pervasively sectarian private schools. Petitioners neglect to mention that more than half of the recipient students attend *public* colleges and that only 17 of the 57 approved colleges in the State have even been charged with being sectarian. Indeed, the Missouri Supreme Court indicated that only four colleges appeared to present any serious questions, and in the wake of that Court's ruling and pursuant to its mandate, two of those four colleges have been expelled from the Program by the Coordinating Board on *statutory* grounds, and a third has been suspended. Yet petitioners are seeking a declaration of *facial* invalidity and are asking the Court to enjoin the entire Program, even as it affects thousands of students attending the 40 colleges which admittedly have no connection whatever with any church.

Moreover, the Stipulation entered into by the parties flatly refutes petitioners' characterization of the 17 challenged institutions. In particular, petitioners have emphasized the number of religion or theology courses taught by certain colleges but have failed to report that the Stipulation provides as follows:

> "Religion or theology courses both at public and private institutions are taught from an academic approach which overall encourages discussion rather than dogmatic indoctrination. In some of the religion or theology courses offered by some of the institutions listed in paragraph 3 hereof, there may be a greater exposure to the history or

[6] There is an additional problem with petitioners' emphasis on the activities of the various institutions, which derives from the fact that the Missouri Program provides student aid, rather than institutional aid. The college which eventually receives the state money is chosen by the student, not by the legislature, and the activities of that institution are constitutionally irrelevant.

> views of the sect or denomination with which those institutions have been historically associated than to those of any other particular sect or denomination. All views are exposed in a neutral manner, however, and the instructors solicit all opinions, whether religious, agnostic or atheistic. In no case does a student's grade depend upon his acceptance or rejection of any particular view. The student is free to accept, reject, question or criticize any subject or viewpoint discussed during the course. In most cases, the religion or theology teacher is unaware of the religious affiliation or preference of individual students" (Tr. 123).

All of the participating colleges, public and private, are approved by an independent accrediting organization (Tr. 113-14), feature an atmosphere of academic freedom (Tr. 119), and ascribe to the principles of academic freedom set forth in the 1940 Statement of the American Association of University Professors (Tr. 112-15, 119). None of the Missouri colleges has ever refused admission to any student on the basis of religion (Tr. 122), and the Stipulation further provides that, with the possible exception of the institutions which have since been expelled or suspended, none of the governing boards of any college, or the members thereof, "are legally responsible or accountable to any church, sect, denomination or religious body for the operation or conduct of the institution" (Tr. 115). Only one of the currently approved colleges requires any chapel attendance, and even there the student may meet the requirements by attending convocation programs of a non-religious nature (Tr. 126). The Court will note the similarity of the institutions in this case to those involved in *Roemer*. In fact, the Missouri colleges are significantly less church-related than the Maryland colleges in *Roemer*.

The Petition filed in this case is a veritable hodge-podge of irrelevancies and includes criticism of one school's prohibition against dancing (Pet. 19); disapproval of the availability of

non-compulsory church services (Pet. 15, 25, 26, 29, 34); and the general suggestion that anyone who believes in God is "tainted" (Pet. 38). Petitioners have completely misconceived the nature of private higher education and the scope of the Establishment Clause, as manifested by their specious assertion that participating private institutions are constitutionally prohibited from engaging in any activities which would not be tolerated in public colleges (Pet. 40).

Petitioners' approach to the Establishment Clause issue is dominated by the seriously mistaken notion that any organization which encourages people to lead an ethical and moral life consistent with Judeo-Christian principles is thereby "sectarian" to the extent that it is constitutionally disentitled to receive state or federal money, directly or indirectly. Aside from the "free exercise" and equal protection problems which inhere in such a theory, petitioners' plea for compulsory atheism is at odds with numerous decisions of this Court, including *Zorach v. Clauson*, 343 U.S. 306 (1952); *Abington School District v. Schempp*, 374 U.S. 203 (1963); *Walz v. State Tax Commission*, 397 U.S. 664 (1970); and *McCollum v. Board of Education*, 333 U.S. 203, 236 (1948) (Jackson, J., concurring). The fact is that none of the challenged Missouri colleges has been held to be "sectarian" by either of the lower courts, and petitioners' self-serving characterization of them as "sectarian" is pegged on a grievously distorted analysis of the record and misapprehension of the law.

This Court has stressed that total separation of church and state is simply not possible in our society nor is it demanded by the Establishment Clause. *Zorach v. Clauson, supra; Board of Education v. Allen*, 392 U.S. 236 (1968); *Walz v. State Tax Commission, supra.* Rather, as recently reaffirmed in *Roemer, supra*, at 188: "Neutrality is what is required. The State must confine itself to secular objectives and neither advance nor impede religious activity." It cannot seriously be contended that

a student assistance program which enables needy students to attend the public or private college of their choice does not fulfill a worthwhile secular objective. *Everson v. Board of Education*, 330 U.S. 1 (1947); *Board of Education v. Allen, supra.*

Another of the principal shortcomings of petitioners' First Amendment analysis arises from their refusal to acknowledge the well-accepted distinction between higher education and the elementary and secondary parochial schools involved in such cases as *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973); and *Meek v. Pittenger*, 421 U.S. 349 (1975). In *Tilton v. Richardson, supra* at 685-86, the plurality opinion expressly took note of the distinctions between college education and that provided at lower levels:

> "There are generally significant differences between the religious aspects of church-related institutions of higher learning and parochial elementary and secondary schools. The 'affirmative if not dominant policy' of the instruction in pre-college church schools is 'to assure future adherents to a particular faith by having control of their total education at an early age' . . . There is substance to the contention that college students are less impressionable and less susceptible to religious indoctrination. Common observation would seem to support that view, and Congress may well have entertained it. The skepticism of the college student is not an inconsiderable barrier to any attempt or tendency to subvert the congressional objectives and limitations. Furthermore, by their very nature, college and postgraduate courses tend to limit the opportunities for sectarian influence by virture of their own internal disciplines. Finally, many church-related colleges and universities seek to evoke free and critical responses from their students and are characterized by a high degree of academic freedom."

Petitioners continue to assert that the earlier college-aid cases were decided on the basis of "the nature of the aid received

and not upon the nature of the recipient" (Pet. 45). Such a statement completely disregards the holding in *Roemer, supra,* at 199, where it was observed that:

> "Our holdings are better reconciled in terms of the character of the aided institutions, found to be so dissimilar as between those considered in *Tilton* and *Hunt* on the one hand, and those considered in *Lemon I, Nyquist,* and *Levitt,* on the other."

Even when the nature of the aid is scrutinized, petitioners fare no better. They attempt to blur the clear distinction between the Missouri Student-Aid Program and the outright institutional grants of state monies that were involved in this Court's decisions in *Roemer, Tilton* and *Hunt.* The cornerstone of petitioners' argument is that no program of aid to education can receive First Amendment approbation unless the statute contains an express restriction against the ultimate use of the funds by the college for "sectarian purposes." Petitioners' insistence upon a restriction against "sectarian use" ignores the nature of tuition itself and the Missouri Supreme Court's holding that the true beneficiaries of the Program are the students, not the colleges. Rather than authorizing outright institutional grants or the construction of a building, the instant case involves awards to individual students who use the funds, together with federal grants, scholarships and their own finances, to purchase an educational opportunity. By definition, the institution is not free to expend the funds for any purpose it pleases, but it is required to provide a *quid pro quo* to the student.[7] The evidence also reveals that the tuition fees charged by Missouri colleges cover less than one-half of the cost of a student's education (Tr. 127).

Contrary to petitioners' suggestion, this Court has never intimated, much less held, that a restriction against "sectarian

[7] Moreover, the record shows that there are a great many instances in which the student has already paid his account to the school by the time the award checks are issued, and his check is therefore delivered to and retained by him (Tr. 111-12, 146).

use" is a *sine qua non* of the constitutionality of a tuition assistance program. It is true that in *Roemer,* the Court recognized that a "secular use" restriction may be appropriate in cases of *direct* and *uncategorical* gifts of state money to a sectarian institution. The plurality opinion, however, indicated that this restriction was necessary only because of the direct nature of the aid, *l.c.* 188:

> "The Court has taken the view that a secular purpose and a facial neutrality *may* not be enough if in fact the State is lending *direct* support to a religious activity."

Obviously, the form of the "aid" dictates what type of restrictions, if any, may be required. The sectarian restriction to the uncategorical institutional grants in *Roemer* and to the building usage in *Tilton* was necessary to prevent the funding of any "specific religious activity." *Roemer, supra,* at 191, 195. There is no danger of such funding when the money is given to the student, who uses it for tuition, room and board, books, transportation or to help pay other educational expenses at the public or private college of his choice. The funds have lost their identity as "state" money by the time they are paid over to the college, if indeed the college ever receives them. To require each institution to trace each dollar from the state treasury through the student to the college and then to the ultimate use employed by the college is not only unnecessary but impracticable.

In the Tennessee decision referred to by petitioners, *Americans United v. Dunn,* 384 F.Supp. 714 (M.D. Tenn. 1974), the lower court refused to apply the appropriate tripartite test, and this Court, after staying the enforcement of the district court's decree, 420 U.S. 917, and noting probable jurisdiction, 420 U.S. 989, vacated that court's judgment as moot following an amendment to the Tennessee statute, 421 U.S. 958.

The only other federal decision involving a tuition assistance program was the Kansas case of *Americans United v. Bubb,*

379 F.Supp. 872 (D. Kans. 1974). The Kansas statute had no restriction against the ultimate use of funds by the colleges, and in fact contained fewer safeguards than the Missouri Program. Nevertheless, the Kansas Act was upheld as facially constitutional by a three-judge court, and Americans United did not seek review in this Court.

The Missouri Supreme Court properly refused to accept petitioners' "facial" argument based exclusively upon an unproven and hypothetical misuse of funds. The entire thrust of petitioners' case, as revealed by their Petition, is that any *possible* abuse, present or future, should serve to vitiate the entire statute. Such a contention is based upon a faulty reading of *Roemer*, in which it was said, *l.c.* 196:

> "It has not been the Court's practice, in considering facial challenges to statutes of this kind, to strike them down in anticipation that particular applications may result in unconstitutional use of funds."

Three times in the last five years, this Court has scrutinized programs for aid to higher education and each such program has been found to pass constitutional muster. As a result,

> ". . . the slate we write on is anything but clean. Instead there is little room for further refinement of the principles governing public aid to church-affiliated private schools. Our purpose is not to unsettle those principles, so recently reaffirmed . . . or to expand upon them substantially, *but merely to insure that they are faithfully applied in this case*." *Roemer, supra*, at 192.

The governing principles are well established, and this case is *a fortiori*.

CONCLUSION

The distinctive Missouri Statute separates the church from the state to a far greater degree than any college program considered by this Court in previous cases. If petitioners' theory of constitutional law were to prevail, it would require invalidation of every federal student assistance program, including the venerable GI Bill of Rights, 38 U.S.C. § 1651. The Missouri Supreme Court "faithfully applied" the well-settled teachings of *Roemer* and its progenitors and reached the only result attainable on the facts of this case.

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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